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(Last updated March 14, 2005)

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# SUMMARIES OF ORDERS

<b>Final Order Date:</b>	05/04/74 (G)	<b>Applicant:</b>	Westmoreland Resources
<b>Case #/Type:</b>	10-g42KJ (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	07/11/73	<b>Examiner:</b>	Chronister
<b>Hearing Date:</b>	01/14/74	<b>Use:</b>	Industrial
<b>A-4.9395</b>	Interim permit showed no well interference or adverse effect to		
<b>I-14.900</b>	surface users by groundwater well.		
<b>Final Order Date:</b>	05/10/74 (G W/C)	<b>Applicant:</b>	Bird
<b>Case #/Type:</b>	32-s41E (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	07/24/73	<b>Examiner:</b>	Chronister
<b>Hearing Date:</b>	12/17/73	<b>Use:</b>	Mining
<b>A-4.9394</b>	Objections pertained to water quality since source is also source		
<b>S-15.920</b>	for the Town of Basin. Neither objector produced sufficient		
<b>O-2.490</b>	evidence to warrant denial of permit. Granted.		
<b>B-21.780</b>	(Caveat: it is now responsibility of applicant to prove no adverse effect.)		
<b>Final Order Date:</b>	07/08/74 (G W/C)	<b>Applicant:</b>	Nussbaum/Johnson
<b>Case #/Type:</b>	201-g76LJ (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	?	<b>Examiner:</b>	Chronister
<b>Hearing Date:</b>	04/29/74	<b>Use:</b>	Irrigation
<b>A-4.9395</b>	Pumping at requested rate may adversely affect objector's wells.		
<b>T-5.800</b>	[Permit granted with condition that amount could later be reduced.]		
<b>Final Order Date:</b>	08/14/74 (G W/C)	<b>Applicant:</b>	Diehl Development Corporation
<b>Case #/Type:</b>	107-s41I (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	08/15/73	<b>Examiner:</b>	Doney
<b>Hearing Date:</b>	06/11/74	<b>Use:</b>	Irrigation
<b>A-4.9392</b>	The rights of prior appropriators should not be adversely affected		
<b>T-5.800</b>	if applicant is required to allow a flow of water to pass the proposed point of diversion for the protection of existing rights.		
<b>E-14.9376</b>	Since sufficient quantities of water will be maintained in the stream for the protection of aquatic life, it is unnecessary to determine whether the public has an existing water right in Prickley Pear Creek for recreational use, nor is it necessary to determine whether under the Montana Environmental Protection Act, a permit may be conditioned for the sole purpose of preserving environmental quality.		
<b>Final Order Date:</b>	09/06/74 (G W/C)	<b>Applicant:</b>	Skyliner Corp.
<b>Case #/Type:</b>	912-s41K (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	11/05/73	<b>Examiner:</b>	MacIntyre
<b>Hearing Date:</b>	08/07/74	<b>Use:</b>	Recreation
<b>S-15.920</b>	Water from developed springs contributes to source. Held,		
<b>U-14.1259.25</b>	Held, unappropriated water available.		

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<b>Final Order Date:</b>	09/10/74 (D)	<b>Applicant:</b>	Coutts
<b>Case #/Type:</b>	67-s43D (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	08/07/73	<b>Examiner:</b>	Chronister
<b>Hearing Date:</b>	08/12/74	<b>Use:</b>	Irrigation

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U-14.1259      Objector has prior claim to waste and seepage waters  
W-1.870        sought; the proposed appropriation would adversely and totally  
interfere with objector's claims.

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<b>Final Order Date:</b>	10/03/74 (G W/C)	<b>Applicant:</b>	City of Ronan
<b>Case #/Type:</b>	73-g76L (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	08/08/73	<b>Examiner:</b>	Chronister
<b>Hearing Date:</b>	04/30/74	<b>Use:</b>	Commercial

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E-24.4848      Indians have paramount rights in waters of Flathead Reservation to  
J-21.800        the extent of their reserved right, and the State of Montana has no  
jurisdiction to regulate, apportion, or otherwise affect or diminish  
those rights; however, the State does have jurisdiction to regulate  
surplus water.

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<b>Final Order Date:</b>	10/20/74 (DIS)	<b>Applicant:</b>	Swart
<b>Case #/Type:</b>	1437-s42KJ (P)	<b>Regional Office:</b>	Miles City
<b>Application Date:</b>	01/30/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	09/25/74	<b>Use:</b>	Stock

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A-16.7567      Because applicant has an existing reservoir in the same coulee as  
the proposed point of diversion, the above matter should be  
considered an application to change the point of diversion, and  
applicant allowed to withdraw this application and apply for a  
change.

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<b>Final Order Date:</b>	11/08/74 (G)	<b>Applicant:</b>	Burlington Northern, Inc.
<b>Case #/Type:</b>	1676-c41I (C)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	03/06/74	<b>Examiner:</b>	?
<b>Hearing Date:</b>	09/09/74	<b>Use:</b>	Irrigation

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A-4.9395        Although flow rate used in past for locomotive water (very little  
E-24.480        volume actually diverted), change in use allowed to irrigate golf  
course. No adverse effect.

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<b>Final Order Date:</b>	11/11/74 (G W/C)	<b>Applicant:</b>	Bureau of Land Management
<b>Case #/Type:</b>	1681-s43Q (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	03/05/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	09/26/74	<b>Use:</b>	Irrigation

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L-1.940        "Different types of surface water" doctrine nullified by Water Use  
Act.

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<b>Final Order Date:</b>	11/26/74 (G W/C)	<b>Applicant:</b>	Kane
<b>Case #/Type:</b>	77-c43D (C)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	12/07/73	<b>Examiner:</b>	Nugent
<b>Hearing Date:</b>	07/01/74	<b>Use:</b>	Irrigation

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B-21.780        Burden of proof in a change proceeding is upon those who allege  
injury.

<b>Final Order Date:</b>	12/05/74 (G W/C)	<b>Applicant:</b>	Crumpled Horn
<b>Case #/Type:</b>	546-s410 (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	10/01/73	<b>Examiner:</b>	Spaeth
<b>Hearing Date:</b>	08/05/74	<b>Use:</b>	Irrigation

A-16.7516      Application for water right for use on state lands does not comply  
L-1.940          with R.C.M. which governs the acquisition of a water right by lessee  
of state lands. Therefore, that portion of the application must be  
denied.

<b>Final Order Date:</b>	12/11/74 (D)	<b>Applicant:</b>	Bureau of Land Management
<b>Case #/Type:</b>	1623-s41I (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	02/22/74	<b>Examiner:</b>	MacIntyre
<b>Hearing Date:</b>	09/09/74	<b>Use:</b>	Drilling Geothermal Research Well

I-14.900      Department issued interim permit for drilling of research well which  
L-1.940          permit terminated on October 1, 1974. A provisional permit may not  
be issued, and no use right has been created in applicant.

<b>Final Order Date:</b>	12/18/74 (G W/C)	<b>Applicant:</b>	Czerwinski
<b>Case #/Type:</b>	425-s76N (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	09/14/73	<b>Examiner:</b>	Spaeth
<b>Hearing Date:</b>	07/15/74	<b>Use:</b>	Irrigation/Stock/ Fish Pond

M-5.110      Canal inadequate.  
  
[Permit issued with condition that canal be improved in two years.]

<b>Final Order Date:</b>	12/19/74 (G W/C)	<b>Applicant:</b>	Scott
<b>Case #/Type:</b>	1283-g410 (C)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	01/07/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	10/07/74	<b>Use:</b>	Irrigation

A-4.9395      Applicant's existing right only to depth of 17 feet. Thus if water  
E-24.480          table should drop below 17 feet, applicant is prohibited from  
further pumping.

A-16.7567      Well to be drilled six feet from existing water right pit.  
Department determined this a change in point of diversion.

<b>Final Order Date:</b>	01/03/75 (G W/C)	<b>Applicant:</b>	Shipman
<b>Case #/Type:</b>	1598-s41S (P)	<b>Regional Office:</b>	Lewistown
	1599-s41S & 1600-s41S (P)		
<b>Application Date:</b>	02/15/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	10/17/74	<b>Use:</b>	Irrigation

A-4.930      Testimony did not conclusively establish that the proposed  
B-21.780          diversions would interfere with existing rights.

<b>Final Order Date:</b>	01/28/75 (G/WC)	<b>Applicant:</b>	Thompson
<b>Case #/Type:</b>	101-s41I (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	08/13/73	<b>Examiner:</b>	Chronister
<b>Hearing Date:</b>	05/13/74	<b>Use:</b>	Irrigation

A-4.930      Interim permit granted. Well pumped to determine adverse effect on

I-14.900                    objector's springs and subirrigation. Department engineers found no adverse effect. Granted.

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<b>Final Order Date:</b>	01/28/75 (G W/C)	<b>Applicant:</b>	Montana Department of State Lands
<b>Case #/Type:</b>	217-s42J (P) 218-s42J & 1112-s42J	<b>Regional Office:</b>	Miles City
<b>Application Date:</b>	08/31/73	<b>Examiner:</b>	Nugent
<b>Hearing Date:</b>	08/20/74	<b>Use:</b>	Irrigation

M-5.110                    Means of diversion (dam) must be changed to allow all water through until objector's rights are satisfied.

U-14.120                    Seldom is unappropriated water in source.

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<b>Final Order Date:</b>	03/05/75 (G W/C)	<b>Applicant:</b>	Faber
<b>Case #/Type:</b>	1136-s40I (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	12/10/73	<b>Examiner:</b>	Spaeth
<b>Hearing Date:</b>	08/28/74	<b>Use:</b>	Irrigation

A-4.930                    Water available only when water flows past objectors' existing dams.

U-14.120

O-2.490

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<b>Final Order Date:</b>	03/05/75 (G)	<b>Applicant:</b>	Armstrong
<b>Case #/Type:</b>	1825-s40A (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	03/20/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	11/12/74	<b>Use:</b>	Irrigation/Stock

A-4.930                    Because stream goes underground below applicant but above objector, it was not conclusively established that any amount of withdrawal at applicant's pond would adversely affect objector's water right. Held, no adverse effect.

U-14.1259

[Permit granted.]

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<b>Final Order Date:</b>	03/05/75 (G)	<b>Applicant:</b>	Klasna
<b>Case #/Type:</b>	1879-s40P (P)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	03/26/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	11/21/74	<b>Use:</b>	Stock

E-24.4831                    Evidence did not conclusively establish a water right in objector which would be protected under the Montana Water Use Act.

P-18.720                    Department does not have authority to deny permit on basis of land damage from saline seep.

W-1.870

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<b>Final Order Date:</b>	03/05/75 (G W/C)	<b>Applicant:</b>	Dover
<b>Case #/Type:</b>	2012-s41S (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	04/11/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	12/10/74	<b>Use:</b>	Irrigation

A-4.930                    Evidence did not conclusively establish that granting of permits would adversely affect objector's prior existing water rights.

[Permit granted.]

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<b>Final Order Date:</b>	03/24/75 (G W/C)	<b>Applicant:</b>	Blair
<b>Case #/Type:</b>	1602-g41N (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	02/20/74	<b>Examiner:</b>	MacIntyre
<b>Hearing Date:</b>	01/21/75	<b>Use:</b>	Irrigation

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A-4.930 Evidence did not conclusively establish that objector's rights would  
B-21.780 be adversely affected.

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<b>Final Order Date:</b>	03/24/75 (G W/C)	<b>Applicant:</b>	Little Beaver Creek Ranches, Inc.
<b>Case #/Type:</b>	1821-s76M (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	03/18/74	<b>Examiner:</b>	Spaeth
<b>Hearing Date:</b>	10/16/74	<b>Use:</b>	Irrigation

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A-4.9383 Applicant may not interfere with existing subirrigation rights by  
E-24.4879 lowering level of stream. [Later decisions contrary.]  
M-5.1188

B-5.690 The use of water which causes significant soil erosion is not a  
beneficial use of water. [?]

E-24.4834 Testimony as to recreational and wildlife uses of stream irrelevant  
as such uses not recognized.

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<b>Final Order Date:</b>	03/24/75 (G W/C)	<b>Applicant:</b>	Treasure State Acres, Inc.
<b>Case #/Type:</b>	1940-s41I (C)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	04/04/74	<b>Examiner:</b>	Spaeth
<b>Hearing Date:</b>	10/10/74	<b>Use:</b>	Domestic

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A-4.9348.20 Only that portion of right diverted at confluence of Seven Mile and  
Ten Mile Creeks allowed to be transferred and moved, as move of  
rights above confluence would result in Ten Mile Creek going dry to  
the confluence. [?]  
  
[Transfer granted in part.]

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<b>Final Order Date:</b>	03/24/75 (G W/C)	<b>Applicant:</b>	Colver
<b>Case #/Type:</b>	2176-s41S (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	05/02/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	12/11/74	<b>Use:</b>	Stock

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A-4.930 The evidence tended to indicate that grant would not adversely  
affect objector's rights.  
  
[Permit granted.]

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<b>Final Order Date:</b>	03/24/75 (G W/C)	<b>Applicant:</b>	Anderson
<b>Case #/Type:</b>	2272-g41O (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	05/13/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	01/06/75	<b>Use:</b>	Irrigation

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T-5.800 [Permit granted with proviso that if it were determined that  
existing rights are adversely affected, the permit will be  
modified.]

<b>Final Order Date:</b>	04/14/75 (G W/C)	<b>Applicant:</b>	Montana Department of State Lands/ Hurlburt
<b>Case #/Type:</b>	1316-s400 (P)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	01/15/74	<b>Examiner:</b>	Spaeth
<b>Hearing Date:</b>	08/27/74	<b>Use:</b>	Stock
<b>A-16.7567</b> Application for permit changed at hearing to application for change in existing right.			
<b>M-5.110</b> Existing dam to be rebuilt 300 feet upstream.			
<b>Final Order Date:</b>	04/14/75 (G W/C)	<b>Applicant:</b>	McLean
<b>Case #/Type:</b>	1387-s40R (P)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	01/24/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	11/20/74	<b>Use:</b>	Stock
<b>E-24.4831</b> Objector's claim of water right is greatly exaggerated. Department only recognizes it as 57 acre-feet.			
<b>Final Order Date:</b>	04/14/75 (G W/C)	<b>Applicant:</b>	Howell
<b>Case #/Type:</b>	1655-s43D (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	04/03/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	01/15/75	<b>Use:</b>	Irrigation
<b>U-14.120</b> Unappropriated water available only during high spring runoff.			
<b>Final Order Date:</b>	04/14/75 (G W/C)	<b>Applicant:</b>	McKinlay
<b>Case #/Type:</b>	2029-s41S (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	04/15/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	12/10/74	<b>Use:</b>	Irrigation
<b>O-2.490</b> All objections filed late. Objections dismissed. [Permit granted.]			
<b>Final Order Date:</b>	04/14/75 (G W/C)	<b>Applicant:</b>	Ferguson
<b>Case #/Type:</b>	2417-s41QJ (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	05/21/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	12/09/74	<b>Use:</b>	Irrigation
<b>T-5.800</b> [Objection settled upon stipulation that permit include condition that waters not be diverted when river flow below certain benchmark on Castener Creek.]			
<b>Final Order Date:</b>	04/28/75 (G W/C)	<b>Applicant:</b>	Beldens
<b>Case #/Type:</b>	2591-s41S (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	06/17/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	12/10/74	<b>Use:</b>	Fish/Stock
<b>A-4.930</b> Evidence tended to show that approval of this application would not adversely affect existing rights of objector. [Permit granted.]			
<b>Final Order Date:</b>	04/75 (G W/C)	<b>Applicant:</b>	Hinebauch
<b>Case #/Type:</b>	2567-g40J (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	06/11/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	11/14/74	<b>Use:</b>	Irrigation
<b>A-4.930</b> Evidence did not conclusively establish that granting the a permit			



B-21.780 would adversely affect prior rights.

E-24.4831 A filed appropriation is a valid water right only to the extent and limit of the quantity of water put to beneficial use. [Permit granted.]

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<b>Final Order Date:</b>	05/08/75 (G W/C)	<b>Applicant:</b>	McKinlay
<b>Case #/Type:</b>	2028-s41S (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	04/15/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	12/10/74	<b>Use:</b>	Irrigation/Stock

A-4.930 Evidence showed that to allow applicant to fill his reservoirs in  
U-14.1259 summer months would adversely affect objectors. [Permit granted  
modified to preclude summer impoundment.]

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<b>Final Order Date:</b>	05/19/75 (G W/C)	<b>Applicant:</b>	Windels
<b>Case #/Type:</b>	1826-g40J (P)	<b>Regional Office:</b>	Havre
	1827-g40J & 1828-g40J (P)		
<b>Application Date:</b>	03/20/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	11/14/74	<b>Use:</b>	Irrigation

A-4.930 Evidence did not conclusively establish that granting permits would  
adversely affect prior existing groundwater rights. [Permit  
granted.]

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<b>Final Order Date:</b>	05/19/75 (G W/C)	<b>Applicant:</b>	Van Voast
<b>Case #/Type:</b>	2302-g40J (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	05/15/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	11/14/74	<b>Use:</b>	Irrigation

A-4.930 Evidence did not conclusively establish that granting permit would  
B-21.780 adversely affect prior rights.

B-5.690 A filed appropriation is a valid water right only to the extent and  
E-24.4831 limit of the quantity of water put to beneficial use. [Permit  
granted.]

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<b>Final Order Date:</b>	05/19/75 (G W/C)	<b>Applicant:</b>	Matter
<b>Case #/Type:</b>	2079-g40A (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	04/22/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	11/13/74	<b>Use:</b>	Irrigation

A-4.93348.00 Objectors feared a new well would result in an annual withdrawal  
A-4.9395 rate that would exceed the annual recharge of the aquifer. However,  
E-22.480 evidence presented did not conclusively establish that granting  
O-2.490 permit would adversely affect prior rights.  
B-21.780

E-24.4831 A water right is valid only to the extent and limit of quantity of  
water actually beneficially use. Granted.

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<b>Final Order Date:</b>	05/20/75 (G W/C)	<b>Applicant:</b>	Morgan
<b>Case #/Type:</b>	1-s41H (P)	<b>Regional Office:</b>	Bozeman
	98-c41H (C)		
<b>Application Date:</b>	07/03/73	<b>Examiner:</b>	Chronister
<b>Hearing Date:</b>	06/03/74	<b>Use:</b>	Irrigation

J-21.800 No conclusion as to ownership of the ditch; such question properly  
decided in court.

M-5.110 Ditch is adequate as the parties with an interest therein have in the past been able to accommodate their rights.

U-14.120 There are excess unappropriated waters in West Gallatin River in May and June.

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<b>Final Order Date:</b>	05/23/75 (G W/C)	<b>Applicant:</b>	Papez
<b>Case #/Type:</b>	2457-s43B (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	05/31/74	<b>Examiner:</b>	Spaeth
<b>Hearing Date:</b>	10/01/74	<b>Use:</b>	Stock

A-4.9348.10 Change in existing right allowed even though for increased acreage, as this increase is offset by addition of other water into the drainage. [?]

A-16.7567 Change in existing water right considered applied for although application is for new permit only.  
[Permit granted; change authorized.]

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<b>Final Order Date:</b>	05/27/75 (G W/C)	<b>Applicant:</b>	Swart
<b>Case #/Type:</b>	1438-s42KJ (P)	<b>Regional Office:</b>	Miles City
<b>Application Date:</b>	01/30/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	09/25/74	<b>Use:</b>	Stock

E-24.4810 Three-fourths of objector's right has been abandoned; therefore no adverse effect to his right hereby.

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<b>Final Order Date:</b>	06/06/75 (G W/C)	<b>Applicant:</b>	Garrison
<b>Case #/Type:</b>	1523-s76D (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	02/08/74	<b>Examiner:</b>	Spaeth
<b>Hearing Date:</b>	12/16/74	<b>Use:</b>	Irrigation

E-24.4834 Nondiversiory recreational and wildlife uses not recognized under Montana law. [Temporary permit issued.]

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<b>Final Order Date:</b>	08/27/75 (D)	<b>Applicant:</b>	Kimpton Ranch Co.
<b>Case #/Type:</b>	2248-c41I (C)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	05/09/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	02/27/75	<b>Use:</b>	Irrigation

E-24.480 [Change denied because applicant apparently does not own right.]

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<b>Final Order Date:</b>	10/01/75 (G W/C)	<b>Applicant:</b>	Pedersen
<b>Case #/Type:</b>	2571-s40R (P)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	06/12/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	05/08/75	<b>Use:</b>	Irrigation

A-4.930 Objector Medicine Lake Refuge will not be adversely affected because application only for times of extreme high flow when there is  
E-24.4834 unappropriated water in the source. [Permit granted.]  
U-14.1259

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<b>Final Order Date:</b>	10/10/75 (D)	<b>Applicant:</b>	Schell
<b>Case #/Type:</b>	1769-s42L (P)	<b>Regional Office:</b>	Miles City
<b>Application Date:</b>	03/08/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	02/06/75	<b>Use:</b>	Irrigation

U-14.120 No unappropriated water in coulee. [Permit denied.]

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<b>Final Order Date:</b>	10/15/75 (G W/C)	<b>Applicant:</b>	Christensen
<b>Case #/Type:</b>	702-s41K (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	10/15/73	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	04/03/75	<b>Use:</b>	Irrigation

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A-4.930 Upstream objector cannot be adversely affected by issuance of permit.

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<b>Final Order Date:</b>	10/15/75 (G W/C)	<b>Applicant:</b>	Smerker
<b>Case #/Type:</b>	2733-s41Q (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	06/27/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	04/17/75	<b>Use:</b>	Irrigation

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B-5.6979 Notice of appropriation (1891) for a quantity of water more than the  
E-24.4831 quantity of the applicant's beneficial use of that right does not  
diminish the quantity applicant can receive under new permit.  
[Permit granted.]

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<b>Final Order Date:</b>	10/15/75 (G W/C)	<b>Applicant:</b>	Clute
<b>Case #/Type:</b>	2888-s76L (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	07/09/74	<b>Examiner:</b>	Spaeth
<b>Hearing Date:</b>	06/05/75	<b>Use:</b>	Irrigation/Stock

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E-24.4848 Salish and Kootenai conditions.

U-14.1259 Applicant can only divert from Fred's Swamp after water derived  
therefrom ceases to flow onto objector's property, as objector has a  
right to the flow out of Fred's Swamp when it flows.

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<b>Final Order Date:</b>	10/17/75 (G)	<b>Applicant:</b>	Owen
<b>Case #/Type:</b>	2911-s76H (P)	<b>Regional Office:</b>	Missoula
	2912-s76H (P)		
<b>Application Date:</b>	07/11/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	05/13/75	<b>Use:</b>	Irrigation

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A-4.930 Because all objectors are upstream of applicant, prior existing  
appropriations cannot be adversely affected by issuance of permit.

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<b>Final Order Date:</b>	11/03/75 (G)	<b>Applicant:</b>	Howser
<b>Case #/Type:</b>	3094-g76L (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	?	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	06/16/75	<b>Use:</b>	Irrigation

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A-16.750 Portion of water here applied for, which had already been first put  
J-21.800 to use before 1973 will have the priority date of that first  
appropriation. [???

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<b>Final Order Date:</b>	11/14/75 (G W/C)	<b>Applicant:</b>	Strangford
<b>Case #/Type:</b>	2193-s39E (P)	<b>Regional Office:</b>	Miles City
<b>Application Date:</b>	05/03/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	07/23/75	<b>Use:</b>	Stock

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E-24.4831 Objector did not successfully show a prior right to be protected;  
T-5.800 however, permit conditioned to protect prior rights. [?]

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<b>Final Order Date:</b>	12/1975 (G W/C)	<b>Applicant:</b>	U.S. Bureau of Land Management
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<b>Case #/Type:</b>	2948-s40E (P)	<b>Regional Office:</b>	Glasgow
	2953-s40E (P)		
<b>Application Date:</b>	07/15/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	06/11/75	<b>Use:</b>	Stock/Wildlife

A-4.930 Evidence did not conclusively establish that objector's right would  
B-21.780 be adversely affected. [Permit granted.]

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<b>Final Order Date:</b>	12/12/75 (W)	<b>Applicant:</b>	Hofer Brothers
<b>Case #/Type:</b>	1957-s41N (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	N/A	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	05/15/75	<b>Use:</b>	?

A-16.750 There is no authority in Water Use Act to terminate with prejudice  
J-21.800 an application which has been withdrawn. Applicant can always  
reapply regardless of inconvenience to objectors. [Applicant  
withdrew application.]

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<b>Final Order Date:</b>	12/12/75 (G W/C)	<b>Applicant:</b>	Johnson, Maynard
<b>Case #/Type:</b>	2364-s40G (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	07/05/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	04/15/75	<b>Use:</b>	Stock

[The following holdings are implied in the order; never actually  
expressed.]

E-22.480 Equivocal testimony does not establish the fact that water would not  
reach the objectors in any event.

I-14.900 Department cannot summarily deny permit because applicant failed to  
J-21.800 obey interim permit.  
S-21.660

U-14.1259 Bare assertion that objectors are unable to exercise water rights in  
the past two to three drought years held insufficient to conclude  
there are no unappropriated waters in the source.

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<b>Final Order Date:</b>	12/12/75 (G W/C)	<b>Applicant:</b>	U.S. Bureau of Land Management
<b>Case #/Type:</b>	2949-s40E (P)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	?	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	06/11/75	<b>Use:</b>	Wildlife

O-2.490 Objection dismissed because objector's point of diversion not  
downstream from proposed point of diversion.

[Objections withdrawn as hearing determined no cause to object.  
Permit granted.]

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<b>Final Order Date:</b>	12/12/75 (G W/C)	<b>Applicant:</b>	Hofer Brothers
<b>Case #/Type:</b>	3626-s41N (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	09/16/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	05/15/75	<b>Use:</b>	Stock

A-4.930 A lone allegation that a downstream appropriator has a prior right  
U-14.1259 and that he has been in recent years unable to exercise the right  
because the source of water was dry in July and August does not  
constitute conclusive evidence that the proposed appropriation will  
adversely affect the prior right.

J-21.800            A landowner cannot be required to seal an existing pit rather than  
M-5.110            enlarge his facilities to obtain additional water. [?]

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<b>Final Order Date:</b>	01/ /76 (G)	<b>Applicant:</b>	Bond, Robert
<b>Case #/Type:</b>	2815-s40G (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	07/05/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	04/15/75	<b>Use:</b>	Stock

A-4.930            Source not tributary to objector's source. Held, there can be no  
S-15.920            adverse effect to objector's water rights. [Permit granted.]

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<b>Final Order Date:</b>	01/03/77 (D)	<b>Applicant:</b>	N Triangle Ranch, Inc.
<b>Case #/Type:</b>	6940-s42M (P)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	?	<b>Examiner:</b>	Chronister
<b>Hearing Date:</b>	10/28/76	<b>Use:</b>	Irrigation

U-14.1259            Source fully appropriated. [Permit denied.]

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<b>Final Order Date:</b>	01/05/76 (G W/C)	<b>Applicant:</b>	U.S. Bureau of Land Management
<b>Case #/Type:</b>	2950-s40E (P) 2951-s40E (P) 2952-s40E (P) 2957-s40E (P)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	07/15/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	06/11/75	<b>Use:</b>	Wildlife/Oil & Gas Drilling

A-4.930            Evidence did not establish conclusively that the proposed  
                     appropriation would adversely affect objector's right; rather,  
                     evidence showed that in most years, right would not be adversely  
                     affected.

M-5.110            Means of diversion adequate except lacks drainage device for  
                     protection of downstream diverters.

[Permit granted with condition of device installation.]

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<b>Final Order Date:</b>	01/22/76 (G)	<b>Applicant:</b>	Johnson, Paul
<b>Case #/Type:</b>	2517-s40G (P) 2518-s40G (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	06/06/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	04/15/75	<b>Use:</b>	Stock

A-4.930            Source not tributary to source from which objector gets water. Held,  
S-15.920            can be no adverse effect to objector's right. [Permit granted.]

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<b>Final Order Date:</b>	01/22/76 (G W/C)	<b>Applicant:</b>	Jensen
<b>Case #/Type:</b>	2679-s40G (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	07/05/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	04/15/75	<b>Use:</b>	Stock

M-5.110            Means of construction not adequate for lack of drainage device.  
                     [Permit issued with condition to install drainage device.]

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<b>Final Order Date:</b>	01/22/76 (G)	<b>Applicant:</b>	Crumpled Horn
<b>Case #/Type:</b>	004516-g410 (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	12/30/74	<b>Examiner:</b>	MacIntyre
<b>Hearing Date:</b>	10/15/75	<b>Use:</b>	Irrigation

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**B-21.780** It would be an unreasonable burden to require each applicant to demonstrate beyond a shadow of a doubt, particularly in case of groundwater appropriations, that his needs will be completely satisfied. This would, in effect, require applicant to have made the appropriation and have expended all of the money in connection therewith before learning whether he is entitled to an appropriation.

**A-4.9395** If all the necessary water were withdrawn from the aquifer located  
**E-24.4879** between the surface and 160 feet below the ground, no well would go dry, but the water level would fall. Held no adverse effect. **Permit granted.**

In subsequent court action, Cause 7076, the court held Applicant's exercise of permit affected certain wells so prior appropriators could not reasonably exercise their rights and ordered applicant to pay one of the prior appropriators \$300.00 as the reasonable expense required to obtain water from his house well. Moreover, if applicant continued to pump, it would be required to pay \$2,526.86 as reasonable expense of obtaining water from a well on state land. But the court held the area is a source of much water. "Here is water, a great deal of water, and as is most usual in such situations, the early users tend to be profligate in their use. That use even though not the most economical must be closely examined and protected. But there are limits, prior is not prior in the absolute since the most inefficient means of diversion will receive absolute autonomy. The word 'reasonable' is the benchmark of all water controversies."

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<b>Final Order Date:</b>	01/22/76 (G W/C)	<b>Applicant:</b>	Smith Farms, Inc.
<b>Case #/Type:</b>	3344-s40R (P)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	08/16/74	<b>Examiner:</b>	Spaeth
<b>Hearing Date:</b>	09/22/75	<b>Use:</b>	Irrigation

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**E-24.4831** Although there is some question as to the validity of the volume of the United States Department of Fish and Wildlife's rights, there is insufficient evidence in the record to reduce such right.

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<b>Final Order Date:</b>	04/05/76 (G W/C)	<b>Applicant:</b>	Neidhardt
<b>Case #/Type:</b>	3068-s76G (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	07/22/74	<b>Examiner:</b>	Gordon
<b>Hearing Date:</b>	01/16/76	<b>Use:</b>	Stock

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**U-14.1259** There is unappropriated water in Fred Burr Creek when there is in excess of 250 M.I. flowing immediately below Lars Olsen's point of diversion.

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<b>Final Order Date:</b>	04/13/76 (G W/C)	<b>Applicant:</b>	DeVries
<b>Case #/Type:</b>	4996-s43D (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	03/10/75	<b>Examiner:</b>	Spaeth
<b>Hearing Date:</b>	12/04/75	<b>Use:</b>	Irrigation

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**A-4.9379** Return flow is an important criterion in determining whether someone will be adversely affected by a change.

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<b>Final Order Date:</b>	04/22/76 (G W/C)	<b>Applicant:</b>	Montana Agricultural
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<b>Case #/Type:</b>	1905-g76LJ (P)	<b>Regional Office:</b>	Experiment Station Kalispell
<b>Application Date:</b>	03/29/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	02/24/75	<b>Use:</b>	Irrigation

**A-4.9395**  
**E-24.4879** Upon receipt of complaint, investigation showed objector's problems with his well not due to seepage from applicant's well, but to applicant's pumping of well. Held, objector could still reasonably exercise his rights with static level fluctuations.

**M-5.110**  
**W-1.870** Means of diversion for flowing artesian well inadequate because when capped, seepage occurs around well casing, and when uncapped, water wasted. Held, well must be fixed so all water diverted therefrom is put to beneficial use.

[Permit granted with condition that well be fixed so can be capped and regulated, and under terms that Department would inspect any complaints of adverse effect made by objectors within a three-year period and reserving unto the Department the right to modify or revoke permit upon consideration of the facts.] [Permit not modified.]

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<b>Final Order Date:</b>	04/23/76 (D)	<b>Applicant:</b>	Stanberry
<b>Case #/Type:</b>	2841-s40G (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	07/08/74	<b>Examiner:</b>	Spaeth
<b>Hearing Date:</b>	10/22/75	<b>Use:</b>	Wildlife/Stock

**U-14.120** No unappropriated water in source. [Permit denied.]

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<b>Final Order Date:</b>	04/28/76 (G W/C)	<b>Applicant:</b>	Hammond
<b>Case #/Type:</b>	3997-g410 (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	10/24/74	<b>Examiner:</b>	Gordon
<b>Hearing Date:</b>	12/15/75	<b>Use:</b>	Irrigation

**S-14.920**  
**A-4.930** Although application is for groundwater, Department hydrogeologist determined source is water in gravel beds comprising floodplain of Teton River and is to some degree hydraulically connected to river. Withdrawal of such water would ultimately affect streamflow in Teton River. In order to prevent adverse effect, permit is conditioned to a two-period pumping scheme.

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<b>Final Order Date:</b>	04/30/76 (G W/C)	<b>Applicant:</b>	Muster
<b>Case #/Type:</b>	5277-s76L (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	04/21/75	<b>Examiner:</b>	Gordon
<b>Hearing Date:</b>	12/19/75	<b>Use:</b>	Irrigation

**A-4.9319** Applicant will not be held accountable for stream loss below his point of diversion not attributable to him.

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<b>Final Order Date:</b>	05/24/76 (G W/C)	<b>Applicant:</b>	Bond, Robert
<b>Case #/Type:</b>	2816-s40G (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	07/05/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	04/15/75	<b>Use:</b>	Stock

[The following holdings are implied in the Final Order although never actually expressed.]

**E-22.480** Equivocal testimony that water would not reach objectors anyway not sufficient to support such a finding.

E-22.480 Bare assertion that objectors unable to exercise water rights in  
U-14.1259 past two to three drought years held insufficient to conclude there  
are no unappropriated waters in the source.

I-14.900 Department cannot deny permit because applicant failed to obey  
J-21.800 interim permit. (?)  
S-21.660

[Permit issued with condition that adequate drainage device be  
installed.]

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<b>Final Order Date:</b>	05/24/76 (G W/C)	<b>Applicant:</b>	Beatty
<b>Case #/Type:</b>	4379-s40J (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	12/12/75	<b>Examiner:</b>	Gordon
<b>Hearing Date:</b>	03/04/76	<b>Use:</b>	Irrigation

E-22.480 Objection to admission of exhibit rises only to challenge as to  
weight thereof.

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<b>Final Order Date:</b>	05/24/76 (G W/C)	<b>Applicant:</b>	Taylor, Garth
<b>Case #/Type:</b>	4492-s41B (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	12/26/74	<b>Examiner:</b>	Gordon
<b>Hearing Date:</b>	03/01/76	<b>Use:</b>	Recreation/Fish/ Wildlife

U-14.120 Unappropriated water available only from October 16 through March  
31. Permit limited to that period.

U-14.1259.70 Although use supposed to be nonconsumptive, may be consumptive.

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<b>Final Order Date:</b>	05/24/76 (G W/C)	<b>Applicant:</b>	Standley, Sr.
<b>Case #/Type:</b>	5408-s41K (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	04/29/75	<b>Examiner:</b>	Gordon
<b>Hearing Date:</b>	12/16/75	<b>Use:</b>	Irrigation/Stock Fish/Wildlife

A-4.9379 The rule in **United States v. Ide** granting irrigation district  
preference in use of return flow is not necessarily applicable here  
because of differences in facts of the case.

M-5.110 Must install outlet structure in dam in order to bypass flows during  
T-5.800 irrigation season.

T-5.800 There is no unappropriated water during irrigation season;  
U-14.1259 therefore, applicant may not divert without the prior consent of  
prior appropriators.

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<b>Final Order Date:</b>	06/08/76 (G W/C)	<b>Applicant:</b>	Meadows Ranch, Inc.
<b>Case #/Type:</b>	3792-s410 (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	10/01/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	06/16/75	<b>Use:</b>	Irrigation

B-5.690 Bare assertion that applicant has other rights which he is not using  
in full does not constitute grounds for denial of permit for lack of  
beneficial use.

B-5.690 Bare assertion that applicant has not calculated the benefit to be  
gained by installing his irrigation system is not sufficient grounds  
to deny permit for lack of beneficial use.



B-5.690 Bare assertion that applicant has not calculated the exact quantity  
M-5.110 of water needed to maximize consumptive plant use does not  
constitute grounds for denial of permit for inadequate means of  
diversion.

E-22.480 Bare assertion that downstream appropriator has prior existing  
E-24.480 rights does not constitute evidence sufficient to deny permit.

E-22.480 Absent testimony to the contrary, a rancher's testimony is  
E-24.480 conclusive as to the application of water, including means of  
appropriation and beneficial use.

U-14.1274 Bare assertion that the stream has been dry at times in July and  
August does not constitute evidence sufficient to deny permit  
because no unappropriated waters in source.

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<b>Final Order Date:</b>	06/10/76 (G/WC)	<b>Applicant:</b>	Semenza/Muri
<b>Case #/Type:</b>	2418-41K (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	05/28/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	01/06/75	<b>Use:</b>	Irrigation/Stock

E-22.480 Exhibits cannot be accepted into the record after evidentiary  
D-21.780 hearing. To do so denies other parties right to cross-examine  
witnesses who are able to testify to validity of facts contained in  
exhibits.

U-14.120 Unappropriated waters available only until July 15. Permit granted  
T-5.800 for appropriation from May 1 to July 15 and from September 1 to  
October 15.

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<b>Final Order Date:</b>	06/28/76 (D)	<b>Applicant:</b>	Kelly
<b>Case #/Type:</b>	913-s41I (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	03/15/74	<b>Examiner:</b>	Gordon
<b>Hearing Date:</b>	05/03/76	<b>Use:</b>	Irrigation

E-24.4894 Pursuant to **United States v. Ide**, objector herein has a prior right  
U-14.1259 to use of project return flows; consequently there are no  
unappropriated waters in the source, a drainage ditch.

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<b>Final Order Date:</b>	06/30/76 (G W/C)	<b>Applicant:</b>	Zinne
<b>Case #/Type:</b>	5932-s40A (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	07/10/75	<b>Examiner:</b>	Gordon
<b>Hearing Date:</b>	04/13/76	<b>Use:</b>	Irrigation

T-5.800 Proper scheduling of appropriation in Custer Gulch will ensure that  
existing water rights of objectors will be protected.

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<b>Final Order Date:</b>	07/21/76 (G W/C)	<b>Applicant:</b>	Brost
<b>Case #/Type:</b>	1978-s40H (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	08/04/74	<b>Examiner:</b>	Gordon
<b>Hearing Date:</b>	03/04/76	<b>Use:</b>	Irrigation/stock

J-21.800 Real property rights and easements are not within the jurisdiction  
M-5.1129 of the Department. The grant of a permit in no way grants a  
P-18.720 permittee a right to violate real property rights of any person, nor  
E-22.480 does it excuse a permittee from liability for same, even if such  
violation is an avoidable consequence of exercising a permit.  
Similarly, the allegation that granting a permit would result in the  
violation of real property rights is not sufficient basis to deny  
permit.

S-15.920 Permittee cannot be held accountable for stream flow conditions that  
A-4.930 are neither a direct or indirect result of permittee's appropriation  
T-5.800 or other actions. Such unaccountability shall specifically include,  
but not be limited to, accountability for downstream loss of flow  
due to existing underground stream channels.

<b>Final Order Date:</b>	08/09/76 (G W/C)	<b>Applicant:</b>	Meisner
<b>Case #/Type:</b>	4647-s43Q (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	01/21/75	<b>Examiner:</b>	Spaeth
<b>Hearing Date:</b>	12/05/75	<b>Use:</b>	Stock

M-5.110 Means of diversion not adequate - high hazard dam unless carefully  
P-18.720 engineered. Permit conditioned to require same.

<b>Final Order Date:</b>	08/12/76 (G W/C)	<b>Applicant:</b>	Adams, Bert
<b>Case #/Type:</b>	1443-s40J (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	01/31/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	01/07/75	<b>Use:</b>	Irrigation/Stock

E-22.480 Certain entities cannot be joined as parties hereto because they did  
O-2.490 not file timely objections hereto. Their testimony, however, was  
considered in reaching decision herein.

<b>Final Order Date:</b>	08/20/76 (G W/C)	<b>Applicant:</b>	Hoerner Waldorf
<b>Case #/Type:</b>	2789-g76M (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	07/02/74	<b>Examiner:</b>	Spaeth
<b>Hearing Date:</b>	03/06/75	<b>Use:</b>	Industrial

T-5.800 [Permit granted with provision that it can be modified or revoked  
within three-year period if adverse effect to objectors, or if it  
fails to meet state or national standards.]

<b>Final Order Date:</b>	08/26/76 (G W/C)	<b>Applicant:</b>	Cooper
<b>Case #/Type:</b>	5742-s76H (C)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	06/18/75	<b>Examiner:</b>	Spaeth
<b>Hearing Date:</b>	05/18/76	<b>Use:</b>	Irrigation/Stock

J-21.800 The question of right-of-way must be determined in another forum.

<b>Final Order Date:</b>	08/26/76 (G W/C)	<b>Applicant:</b>	Moss
<b>Case #/Type:</b>	6576-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	10/01/75	<b>Examiner:</b>	MacIntyre
<b>Hearing Date:</b>	06/11/76	<b>Use:</b>	Domestic/Irrigation

T-5.800 Applicant may not divert water when there is insufficient water to  
fill existing rights.

<b>Final Order Date:</b>	08/26/76 (G W/C)	<b>Applicant:</b>	Philipps
<b>Case #/Type:</b>	4078-g41P (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	11/06/74	<b>Examiner:</b>	Chronister
<b>Hearing Date:</b>	10/01/75	<b>Use:</b>	Irrigation

U-14.1259.00 Because applicant sought to appropriate from February 1 to April 15  
U-14.1274 to fill a reservoir for use during the irrigation season and  
A-4.930 applicant agreed to a condition that he would never reduce the  
S-20.720 stream flow less than 6 cfs, held no direct effect to irrigators.  
During high spring runoff, applicant's diversion for 3 or 4 days  
would have little real effect upon downstream users. G W/C [P4D]

**T-5.800** Proposed Order modified to require among other things and in  
**M-5.110** addition to conditions proposed, measuring devices in stream at all diversion points and on the pump. Permittee must keep written records of all waters diverted, both to fill the reservoir and that released and again diverted for use. [FO]

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<b>Final Order Date:</b>	09/14/76 (G W/C)	<b>Applicant:</b>	McDonnell
<b>Case #/Type:</b>	2632-s41F (P)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	1974	<b>Examiner:</b>	Chronister
<b>Hearing Date:</b>	10/08/75	<b>Use:</b>	Irrigation

**J-21.800** Department has no jurisdiction to determine ownership of Burrell  
**M-5.110** Ditch.

**M-5.110** Burrell Ditch has sufficient capacity to carry water applicant requests. (Therefore, means of diversion adequate.)

**U-14.1259** There are unappropriated waters in the Dyke Ditch (a public ditch taking from the Madison River and maintained by the Army Corps. of Engineers), as there is more water flowing down it then is presently required by users thereon. [FO]

[Permit granted with condition that Department may modify if complaints received within two-year period. Complaint received later. Permit modified.]

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<b>Final Order Date:</b>	09/21/76 (G W/C)	<b>Applicant:</b>	Loney Bair
<b>Case #/Type:</b>	6453-s41J (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	07/14/74	<b>Examiner:</b>	Spaeth
<b>Hearing Date:</b>	05/13/76	<b>Use:</b>	Irrigation

**E-24.4834** Montana Department of Fish and Game has a valid prior water right to  
**T-5.800** the waters of the Smith River for purposes of maintaining flows necessary for preservation of fish and wildlife habitat. However, same has not been quantified. However, the rights would be protected if permits conditioned to allow further amendments when rights quantified.

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<b>Final Order Date:</b>	09/30/76 (G W/C)	<b>Applicant:</b>	Bair
<b>Case #/Type:</b>	6939-s41J (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	11/24/75	<b>Examiner:</b>	Spaeth
<b>Hearing Date:</b>	05/13/76	<b>Use:</b>	Irrigation

**B-5.6934** Montana Department of Fish and Game has a valid prior water right to  
**E-24.480** the waters of the Smith River for purposes of maintaining flows necessary for preservation of fish and wildlife habitat. However,  
**T-5.800** same has not been quantified. However, the rights would be protected if permits conditioned to allow further amendments when rights quantified.

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<b>Final Order Date:</b>	09/30/76 (G)	<b>Applicant:</b>	State Lands
<b>Case #/Type:</b>	4962-41A (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	03/05/75	<b>Examiner:</b>	Diemert
<b>Hearing Date:</b>	06/24/76	<b>Use:</b>	Irrigation

**J-21.800** Ditch rights and easements are not within the jurisdiction of the  
**M-5.1129** Department. The grant of a permit in no way grants permittee a right

E-22.480 violate real property, nor does it excuse permittee from liability for same.

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<b>Final Order Date:</b>	09/30/76 (G)	<b>Applicant:</b>	Wellborn/McBee
<b>Case #/Type:</b>	5189-41A (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	03/05/75	<b>Examiner:</b>	Diemert
<b>Hearing Date:</b>	06/24/76	<b>Use:</b>	Irrigation

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J-21.800 Ditch rights and easements are not within the jurisdiction of the  
M-5.1129 Department. The grant of a permit in no way grants permittee a right  
E -22.480 violate real property, nor does it excuse permittee from liability  
for same.

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<b>Final Order Date:</b>	10/12/76 (G/WC)	<b>Applicant:</b>	Waltermire
<b>Case #/Type:</b>	4636-76H (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	01/20/75	<b>Examiner:</b>	Spaeth
<b>Hearing Date:</b>	05/17/76	<b>Use:</b>	Irrigation/stock/ domestic

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U.14.1259.00 Water available year round some years and generally during first  
U-14.1274 half of irrigation season.

E-24.4831 Applicant may have existing rights in source. When a determination  
T-5.800 of the nature and extent of those rights is made, the permit shall  
be accordingly amended to reflect such prior rights.

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<b>Final Order Date:</b>	10/22/76 (G W/C)	<b>Applicant:</b>	Berg
<b>Case #/Type:</b>	1351-s41J (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	01/17/74	<b>Examiner:</b>	Spaeth
<b>Hearing Date:</b>	05/13/76	<b>Use:</b>	Irrigation

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E-24.4834 Montana Department of Fish and Game has a valid prior right to the  
water of the Smith River for purposes of maintaining stream flows  
necessary for preservation of fish and wildlife habitat.

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<b>Final Order Date:</b>	11/03/76 (G W/C)	<b>Applicant:</b>	Palmer Ranch, Inc.
<b>Case #/Type:</b>	3358-s40S (P)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	08/19/74	<b>Examiner:</b>	Diemert
<b>Hearing Date:</b>	04/21/76	<b>Use:</b>	Irrigation

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A-16.7567 Motion to treat application as one for new appropriation, but if  
denied, to be treated as application for change of place of use,  
granted. [?]

L-1.940 The common law doctrine of riparian rights has never prevailed in  
Montana.

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<b>Final Order Date:</b>	11/03/76 (G W/C)	<b>Applicant:</b>	Feist
<b>Case #/Type:</b>	3614-s43Q (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	?	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	06/19/75	<b>Use:</b>	Irrigation

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A-4.930 Testimony that objector's stock could not obtain water for a few  
M-5.110 days is not, without more conclusive evidence, proof that the means  
of diversion are unreasonable and therefore adverse.

D-21.310 Notice of hearing, although faulty, did not confuse objector. Motion to dismiss application denied, nor is there need to renotice.

U-14.1259 Volume claimed already appropriated less than approximate production of drainage. Unappropriated water available.

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<b>Final Order Date:</b>	11/11/76 (G W/C)	<b>Applicant:</b>	Konie
<b>Case #/Type:</b>	4063-s76M (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	10/30/74	<b>Examiner:</b>	Diemert
<b>Hearing Date:</b>	09/21/76	<b>Use:</b>	Domestic/Irrigation

M-5.1129 The acquisition of an easement to use the existing ditch to transport water herein applied for is not a prerequisite to this Department's issuance of a provisional permit.

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<b>Final Order Date:</b>	12/21/76 (G W/C)	<b>Applicant:</b>	Obert
<b>Case #/Type:</b>	6322-s43D (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	08/27/75	<b>Examiner:</b>	Diemert
<b>Hearing Date:</b>	08/30/76	<b>Use:</b>	Irrigation

J-21.800 The Department can designate a person to notify a water right user  
L-1.940 of times when there are surplus waters in the source without  
T-5.800 delegating its statutory authority to administer waters. Applicant must check with objector before diverting.

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<b>Final Order Date:</b>	01/11/77 (G W/C)	<b>Applicant:</b>	Vosen
<b>Case #/Type:</b>	3597-s40J (P)	<b>Regional Office:</b>	Havre
	3599-s40J (P)		
<b>Application Date:</b>	09/12/74	<b>Examiner:</b>	Gordon
<b>Hearing Date:</b>	04/22/76	<b>Use:</b>	Wildlife/Stock

A-16.750 Although objector has received his permit first, this permit will be senior as application was made for it first.

E-22.480 The mere riparian claim that water arises on or flows through  
L-1.940 property is not relevant to determination of whether to grant permit.

M-5.110 Bypass facility, or equivalent, needed around pit to protect downstream prior rights.

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<b>Final Order Date:</b>	02/28/77 (G W/C)	<b>Applicant:</b>	Montana Dept. of State Lands
<b>Case #/Type:</b>	5270-s41D (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	04/17/75	<b>Examiner:</b>	Gordon
<b>Hearing Date:</b>	01/20/76	<b>Use:</b>	Irrigation

T-5.800 No unappropriated water in source August 1 to September 20. Permit  
U-14.1259 not issued for that period. Sometimes no unappropriated water from May 1 to July 31. Applicant cannot divert when insufficient water at objectors' points of diversions to meet their prior rights.

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<b>Final Order Date:</b>	02/28/77 (G W/C)	<b>Applicant:</b>	Grosswiler Dairy
<b>Case #/Type:</b>	5638-g76LJ (P)	<b>Regional Office:</b>	Kalispell
	5639-g76LJ (P)		
<b>Application Date:</b>	06/09/75	<b>Examiner:</b>	Diemert
<b>Hearing Date:</b>	09/14/76	<b>Use:</b>	Irrigation

A-4.930 No adverse effect found; however, permit issued anyway with

T-5.800                    provision that Department could order cessation of diversion, or enter upon the property at any time.

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<b>Final Order Date:</b>	02/28/77 (G W/C)	<b>Applicant:</b>	Dunbar
<b>Case #/Type:</b>	6498-s40K (P)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	09/22/75	<b>Examiner:</b>	Diemert
<b>Hearing Date:</b>	06/30/76	<b>Use:</b>	Irrigation

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E-24.4834                Water is impounded by Whitewater Dam for wildlife habitat under  
U-14.1259                United States Fish and Game right. There is unappropriated water in the source when there is sufficient water in the source to maintain goose production.

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<b>Final Order Date:</b>	03/09/77 (G)	<b>Applicant:</b>	Karr
<b>Case #/Type:</b>	5063-43D (C)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	10/17/75	<b>Examiner:</b>	Diemert
<b>Hearing Date:</b>	10/04/76	<b>Use:</b>	Irrigation/stock

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E-24.4810                Water not used for 27 years and ditches plowed under. Held, evidence  
E-24.4831                of 1898 filing of appropriation water right is not conclusive as to validity of that right.

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<b>Final Order Date:</b>	03/24/77 (G W/C)	<b>Applicant:</b>	Otten
<b>Case #/Type:</b>	6894-s76K (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	11/17/75	<b>Examiner:</b>	Spaeth
<b>Hearing Date:</b>	06/14/76	<b>Use:</b>	Irrigation

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E-24.4834                Lake used for recreational purposes. Although proposal contains no findings as to actual water rights for recreation, lake level protected apparently to protect recreation. [Permit granted.]

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<b>Final Order Date:</b>	03/29/77 (G W/C)	<b>Applicant:</b>	Farmers Co-Op Canal Company
<b>Case #/Type:</b>	5266-s410 (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	04/1/75	<b>Examiner:</b>	Gordon
<b>Hearing Date:</b>	03/24/76	<b>Use:</b>	Irrigation

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A-4.9392                Where applicant will store water in a reservoir, enlarged for permit  
S-20.720                purposes, both pursuant to existing water rights and to this permit, to protect other users, permit must be conditioned so that applicant may only appropriate in excess of original capacity, and/or after October 31st of each year pursuant to new priority date.

A-16.7567                Application may not be modified at hearing to include alternate  
S-20.720                place of storage.

B-21.780                Applicant's plan may contemplate diversion at rates greater than  
L-1.790                15 cfs; however, as proof standard for such is clear and convincing evidence, and as the hearing was conducted with the understanding that the request was not for greater than 15 cfs, no permit may issue herein for greater than 15 cfs.

E-22.480                Objections to admission of Exhibit 1 rise only to the level of challenges to its weight.

J-21.800                The issue of property rights other than water is not within  
P-18.720                jurisdiction of Department.

<b>Final Order Date:</b>	04/21/77 (G W/C)	<b>Applicant:</b>	Barrick
<b>Case #/Type:</b>	4342-s41S (P)	<b>Regional Office:</b>	Lewistown
	5122-s41S (P)		
<b>Application Date:</b>	12/10/74	<b>Examiner:</b>	Spaeth
<b>Hearing Date:</b>	09/08/75	<b>Use:</b>	Irrigation

**E-24.4834**      A nondiversiory fish and wildlife use is not recognized under Montana law and the Department will not recognize such a use as a prior beneficial use.

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<b>Final Order Date:</b>	06/27/77 (G W/C)	<b>Applicant:</b>	Bras
<b>Case #/Type:</b>	1028-s76L (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	11/19/73	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	11/25/74	<b>Use:</b>	Irrigation

**E-24.4848**      Salish and Kootenai reserved rights must be protected.

**U-14.120**      Unappropriated water exists in source, Little Bitterroot, only at certain times.

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<b>Final Order Date:</b>	06/27/77 (G W/C)	<b>Applicant:</b>	Erlenbusch
<b>Case #/Type:</b>	4686-s40D (P)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	01/27/75	<b>Examiner:</b>	Gordon
<b>Hearing Date:</b>	04/20/76	<b>Use:</b>	Irrigation/Stock

**E-24.4831**      Objector having not shown compliance with the pre-1973 filed appropriation statute, the right he claims is not necessarily entitled to protection.

**A-4.930**      However, the Department will recognize this right up to the amount shown actually used by the objector prior to filing of this application.

**E-24.480**

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<b>Final Order Date:</b>	07/07/77 (G W/C)	<b>Applicant:</b>	Kemp Ranch Partnership
<b>Case #/Type:</b>	1265-s76L (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	01/02/74	<b>Examiner:</b>	MacIntyre
<b>Hearing Date:</b>	09/23/74	<b>Use:</b>	Irrigation

**J-21.800**      Although no objections filed hereto, because the source, point of diversion, and point of use are so similar to application 1266 which did receive objection, the Department determined that one application cannot be acted on without study of the other. Accordingly, after hearing on 1266, the Department issues the following opinion re 1265.

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<b>Final Order Date:</b>	07/07/77 (G W/C)	<b>Applicant:</b>	Kemp Ranch Partnership
<b>Case #/Type:</b>	1266-s76L (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	01/02/74	<b>Examiner:</b>	MacIntyre
<b>Hearing Date:</b>	09/23/74	<b>Use:</b>	Irrigation

**E-24.480**      Water appropriated under an existing right may be turned into the natural channel of a stream without becoming a part of the natural flow thereof.

**M-5.110**

**U-14.120**      Unappropriated water available only in certain parts of irrigation season.

[Permit issued with limited period of diversion.]

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<b>Final Order Date:</b>	07/07/77 (G/WC)	<b>Applicant:</b>	Baker
<b>Case #/Type:</b>	8317-40D (P)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	05/17/76	<b>Examiner:</b>	MacIntyre
<b>Hearing Date:</b>	04/05/77	<b>Use:</b>	Irrigation

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U-14.120            There is no unappropriated water in source of supply except there  
S-15.920            may be excess water in winter and spring runoff periods during wet  
                      years.

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<b>Final Order Date:</b>	07/13/77 (G W/C)	<b>Applicant:</b>	Finley
<b>Case #/Type:</b>	5364-s76M (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	?	<b>Examiner:</b>	Chronister
<b>Hearing Date:</b>	06/16/76	<b>Use:</b>	Irrigation

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A-4.9325            Applicant must cease pumping when water level in West Twin Creek  
T-5.800            drops below 78 M.I. at objector's point of diversion in order to  
                      prevent adverse effect to tree farm where timing of water  
                      application is crucial.

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<b>Final Order Date:</b>	07/18/77 (G W/C)	<b>Applicant:</b>	Glasscock, III
<b>Case #/Type:</b>	4806-s40D (P)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	?	<b>Examiner:</b>	Chronister
<b>Hearing Date:</b>	11/05/76	<b>Use:</b>	Irrigate

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A-4.930            The present application may not be denied simply because there may  
                      be more like it to follow.

A-4.930            Allowing applicant to impound extremely high spring run-off will  
U-14.1259           not interfere with prior rights.

J-21.800            Oral argument need not be held within the 180 day time period set  
R-5.930            set forth in the statute.

R-5.930            It has been the policy of the Department to accept exceptions if  
                      they are reasonably within the time limit stated in the proposal.

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<b>Final Order Date:</b>	08/04/77 (G W/C)	<b>Applicant:</b>	Kirksey Brothers
<b>Case #/Type:</b>	8518-s41I (C)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	06/02/76	<b>Examiner:</b>	Spaeth
<b>Hearing Date:</b>	05/23/77	<b>Use:</b>	Irrigation

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J-21.800            The law does not require the user of contract water to apply to the  
L-1.940            State for a change in his point of diversion off of the canal  
                      serving contract holders.

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<b>Final Order Date:</b>	08/30/77 (G/WC)	<b>Applicant:</b>	Sivertsen/Doughten
<b>Case #/Type:</b>	3343-40J (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	08/16/74	<b>Examiner:</b>	Diemert
<b>Hearing Date:</b>	07/01/77	<b>Use:</b>	Irrigation/stock/ wildlife

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Oral Argument Date:    05/12/77                            O/A Examiner: Ferris

L-1.940            Montana Water Law sanctions single filling of reservoir in any year  
S-20.720            to store and use in that year and succeeding years what he has a  
                      right to use. Cites **Federal Land Bank v. Morris.**



E-24.4848      A permit issued on a source upstream from Indian reservation is  
R-5.850        subject to tribal reserved rights in the source of supply.  
T-5.800

U-14.1259.00      Unappropriated waters available only when water is spilling at  
U-14.1274        Fresno Dam.

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<b>Final Order Date:</b>	09/01/77 (G/WC)	<b>Applicant:</b>	Stevens
<b>Case #/Type:</b>	8982-g76LJ (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	06/18/76	<b>Examiner:</b>	Gordon
<b>Hearing Date:</b>	03/30/77	<b>Use:</b>	Fish/flood control/ recreation

B-21.780        Applicant must show criteria for issuance of a permit has been met  
even when objectors fail to attend hearing.

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<b>Final Order Date:</b>	09/08/77 (G/WC)	<b>Applicant:</b>	Stoddard
<b>Case #/Type:</b>	7853-41B (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	03/30/76	<b>Examiner:</b>	Throm
<b>Hearing Date:</b>	07/07/77	<b>Use:</b>	Irrigation

S-15.920        Although original well was completed at 20' below surface and new  
U-14.1259.00    well was completed at 60' the source is one aquifer where  
U-15.1274        unappropriated water is available.

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<b>Final Order Date:</b>	10/06/77 (G W/C)	<b>Applicant:</b>	Newman
<b>Case #/Type:</b>	6268-s42KJ (P)	<b>Regional Office:</b>	Miles City
	6269-s42KJ (P)		
	8247-s42KJ (P)		
	8248-s42KJ (P)		
<b>Application Date:</b>	08/22/75	<b>Examiner:</b>	Throm
<b>Hearing Date:</b>	06/22/77	<b>Use:</b>	Irrigation

L-1.790        Cannot grant in excess of 15 cfs since clear and convincing evidence  
required.

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<b>Final Order Date:</b>	10/13/77 (G W/C)	<b>Applicant:</b>	Kammerer
<b>Case #/Type:</b>	9548-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	09/20/76	<b>Examiner:</b>	Throm
<b>Hearing Date:</b>	07/27/77	<b>Use:</b>	Fish/Wildlife

S-21.6621        Although prior departmental decision held that there is no  
U-14.1259.70    unappropriated water in the source for a consumptive use, this use  
is nonconsumptive and there are unappropriated waters for  
nonconsumptive purposes.

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<b>Final Order Date:</b>	10/17/77 (G W/C)	<b>Applicant:</b>	Ford
<b>Case #/Type:</b>	5151-s76M (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	04/02/75	<b>Examiner:</b>	MacIntyre
<b>Hearing Date:</b>	06/10/76	<b>Use:</b>	Irrigation

A-16.7567        Modification of application at hearing to request shorter irrigation  
period is proper.

U-14.120        Unappropriated water available in spring only. Irrigation may only  
be done with spring runoff waters.

<b>Final Order Date:</b>	11/08/77 (G W/C)	<b>Applicant:</b>	Nielsen
<b>Case #/Type:</b>	2220-s76LJ (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	06/05/74	<b>Examiner:</b>	Lewis
<b>Hearing Date:</b>	01/29/75	<b>Use:</b>	Irrigation

**A-4.9394** As requested by Department of Fish and Game, permit conditioned to  
**T-5.800** prevent lake turbidity. [But why if no recreation or wildlife right  
 recognized?]

**E-24.4831** Only recognizable rights out of lake at present are for  
**M-5.1188** subirrigation and lawn watering.

**E-24.4834** Nondiversionary recreational and wildlife uses not considered, as  
 such uses not recognized prior to 1973.

**E-24.4834** [Upon exception by Department of Fish and Game, Department offered  
**R-5.930** objector choice of withdrawing application, proceeding to another  
 hearing with Department of Fish and Game, stipulating to issuance of  
 temporary permit with specific conditions (protecting recreational  
 and fish and wildlife concerns without recognizing any existing  
 rights thereto). Objector chose option 3. FO]

[Temporary permit issued.]

<b>Final Order Date:</b>	12/06/77 (G W/C)	<b>Applicant:</b>	Frolin
<b>Case #/Type:</b>	9787-g76L (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	10/12/76	<b>Examiner:</b>	Throm
<b>Hearing Date:</b>	08/10/77	<b>Use:</b>	Irrigation

**J-21.800** State maintains jurisdiction over underground water which may be  
**S-15.920** geologically connected to water under Flathead Reservation.

<b>Final Order Date:</b>	01/03/78 (G W/C)	<b>Applicant:</b>	Johnson, Dewey
<b>Case #/Type:</b>	7484-s40N (P)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	?	<b>Examiner:</b>	Chronister
<b>Hearing Date:</b>	11/04/76	<b>Use:</b>	Irrigation

**E-24.4831** All water at Vandalia appropriated by United States except during  
**S-20.720** very high runoff in early spring. However, the United States does  
**U-14.1259** not in most years need all the water it has appropriated at Vandalia  
 and such water is appropriable. [Permit granted.]

<b>Final Order Date:</b>	01/03/78 (G W/C)	<b>Applicant:</b>	Linn/Robinson
<b>Case #/Type:</b>	9847-s40J (P)	<b>Regional Office:</b>	Glasgow
	9966-s40J (P)		
<b>Application Date:</b>	09/13/76	<b>Examiner:</b>	Throm
	10/19/76		
<b>Hearing Date:</b>	08/24/77	<b>Use:</b>	Irrigation

**S-15.920** Undeveloped springs and surface runoff, inseparable, together form  
 the source of supply of Little Pumpkin Creek from which objector has  
 a water right.

[Temporary permit issued; the results of appropriation pursuant to  
 be evaluated by the Department, and a regular permit then issued or  
 denied. Evaluation done in 1980; regular permit granted.] [Permit  
 conditioned per stipulation.]

<b>Final Order Date:</b>	01/18/78 (G W/C)	<b>Applicant:</b>	Lee, Donald
<b>Case #/Type:</b>	11180-s43D (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	12/22/76	<b>Examiner:</b>	Throm
<b>Hearing Date:</b>	09/21/77	<b>Use:</b>	Irrigation

S-15.920      Seepage from canal renders part of applicant's property unusable. He  
U-14.1259      may dispose of such seepage, but may only appropriate it for use if  
W-1.870      it does not constitute a source of supply to Rock Creek (which is  
overappropriated). [Permit granted.]

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<b>Final Order Date:</b>	01/20/78 (G)	<b>Applicant:</b>	Reimer
<b>Case #/Type:</b>	8010-76L (P)	<b>Regional Office:</b>	Kalispell
	8246-76L (P)		
<b>Application Date:</b>	04/16/76	<b>Examiner:</b>	Throm
	05/07/76		
<b>Hearing Date:</b>	08/08/77	<b>Use:</b>	Irrigation

J-21.800      The final determination of validity and quantification of existing  
A-16.750      rights are not within jurisdiction of hearing examiner or  
E-24.480      Department. Application to "consolidate position in regard to water  
  
T-5.800      rights" from the source must be treated as new appropriation but  
conditioned so that permit is "inclusive of" rather than "additional  
to" any existing rights in the same source.  
  
I-14.870      Uses such as instream flow for fish, wildlife, recreation, and  
B-5.6934      scenic values were not defined as beneficial uses prior to 1973.  
E-24.4834      Hence no weight given to objections based on such uses.  
O-2.490  
  
J-21.800      Department has no jurisdiction concerning easements. Grant of permit  
does to grant permittee right to violate real property rights of any  
person.

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<b>Final Order Date:</b>	01/30/78 (G W/C)	<b>Applicant:</b>	Gasvoda
<b>Case #/Type:</b>	10819-g76H (P)	<b>Regional Office:</b>	Missoula
	10820-g76H (P)		
<b>Application Date:</b>	12/28/76	<b>Examiner:</b>	Throm
<b>Hearing Date:</b>	07/27/77	<b>Use:</b>	Irrigation

A-4.9395      No adverse effect to objectors if permit is conditioned to prevent  
withdrawals from shallow aquifer.

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<b>Final Order Date:</b>	02/03/78 (G W/C)	<b>Applicant:</b>	Monk
<b>Case #/Type:</b>	9849-s76C (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	10/08/76	<b>Examiner:</b>	Throm
<b>Hearing Date:</b>	08/09/77	<b>Use:</b>	Irrigation

A-4.930      Permittee is specifically "enjoined" from diverting hereunder when  
T-5.800      water rights of objectors would be adversely affected.  
  
A-16.7567      Application does not request storage; therefore, cannot grant  
S-20.720      storage.  
  
A-16.7576      Republication not required although application point of diversion  
D-21.310      corrected at hearing.  
  
I-14.870      Objection of Montana Department of Fish and Game declared invalid

O-2.490 because it has no known appropriation from Fisher River.

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<b>Final Order Date:</b>	03/02/78 (D)	<b>Applicant:</b>	Johnston
<b>Case #/Type:</b>	5569-c41J (C)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	05/30/75	<b>Examiner:</b>	Gordon
<b>Hearing Date:</b>	11/17/76	<b>Use:</b>	Irrigation

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A-16.7567 Amendment of application at hearing to include other changes  
D-21.310 disallowed; violative of due process.

E-24.4810 Examiner lacks sufficient authority to find abandonment.

E-24.4831 Since applicant's exhibit contains a sworn statement alleging actual prior use from 1877 to 1892, and same was uncontested, it must be concluded for purposes herein that the water right did, in fact, vest through actual prior use.

E-24.4831 Action pending during initial hearing finalized prior to final  
R-5.930 order. Decree found no right in applicant. Notice taken of decree at final order stage, proposed finding of water right in applicant reversed. Change denied as no right to change. [FO]

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<b>Final Order Date:</b>	03/03/78 (G W/C)	<b>Applicant:</b>	Willson
<b>Case #/Type:</b>	9961-g42C (P)	<b>Regional Office:</b>	Miles City
<b>Application Date:</b>	10/14/76	<b>Examiner:</b>	Throm
<b>Hearing Date:</b>	09/20/77	<b>Use:</b>	Irrigation

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S-15.920 Undeveloped springs and surface runoff, inseparable, together form the source of supply of Little Pumpkin Creek from which objector has a water right.

[Temporary permit issued; the results of appropriation pursuant to be evaluated by the Department, and a regular permit then issued or denied. Evaluation done in 1980; regular permit granted.]

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<b>Final Order Date:</b>	03/03/78 (D)	<b>Applicant:</b>	Bacon
<b>Case #/Type:</b>	10021-g41H (P)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	11/01/76	<b>Examiner:</b>	Throm
<b>Hearing Date:</b>	10/14/77	<b>Use:</b>	Irrigation

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A-4.9383 No unappropriated waters in Dry Creek. Applicant's pit would withdraw groundwater which stabilizes creek in summer. Held, adverse effect to Dry Creek appropriators.

[Permit denied.]

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<b>Final Order Date:</b>	03/03/78 (G W/C)	<b>Applicant:</b>	Billmayer
<b>Case #/Type:</b>	11345-c40J (C)	<b>Regional Office:</b>	Havre
	11346-c40J (C)		
	11347-c40J (C)		
	11348-c40J (C)		
	11368-c40J (C)		
<b>Application Date:</b>	02/11/77	<b>Examiner:</b>	Throm
	02/16/77 (11368)		
<b>Hearing Date:</b>	08/25/77	<b>Use:</b>	Irrigation

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[Permitted well turned out to be dry holes or low producers. Application to change points of diversion only.]

**A-4.9392** New wells draw from same source (Flaxville gravel) but from a thicker and more permeable part thereof. Held, no adverse effect from move to other appropriators in area if authorization conditioned.

**E-22.480** Fact that permittee already drilled and produces from new wells irrelevant to determination of whether to authorize change.

**J-21.800** Allegation that no change could be authorized because the original wells as permitted had not been perfected, ignored.

**P-5.8021**

[Change authorized with condition that records of well levels be kept, and if it be determined that new wells interfere with prior water rights, authorizations will be modified.]

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<b>Final Order Date:</b>	03/15/78 (G W/C)	<b>Applicant:</b>	Shotliff/Haugh
<b>Case #/Type:</b>	9757-s76K (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	10/06/76	<b>Examiner:</b>	Throm
<b>Hearing Date:</b>	10/27/77	<b>Use:</b>	Irrigation

**B-5.6979** Volume requested is excessive.

**U-14.120** There are unappropriated waters in the source, but not throughout period. Permit conditioned.

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<b>Final Order Date:</b>	04/14/78 (G W/C)	<b>Applicant:</b>	Jacobson
<b>Case #/Type:</b>	9969-g76L (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	10/21/76	<b>Examiner:</b>	Throm
<b>Hearing Date:</b>	11/02/77	<b>Use:</b>	Irrigation

**J-21.800** The quantification and final determination of the validity of beneficial use rights must be established in accordance with the procedures mandated by § 98-870 et seq of Montana Water Use Act.

**E-24.4831**

**O-2.490** Held, evidence submitted by objectors failed to show the prior existing water rights would be adversely affected. (Caveat: it is now applicant's burden to prove no adverse effect.)

**E-22.480**

**B-21.780**

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<b>Final Order Date:</b>	06/07/78 (G W/C)	<b>Applicant:</b>	Blakely
<b>Case #/Type:</b>	7504-g41H (P)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	02/17/76	<b>Examiner:</b>	Gordon
<b>Hearing Date:</b>	12/20/76	<b>Use:</b>	Irrigation

**U-14.1259.25** Although there is no unappropriated water presently in creek, applicant will attempt to increase flow by constructing settling pond. Held, there may be unappropriated water in source.

[Permit granted with condition that applicant may not appropriate unless he is successful in increasing flow of creek.]

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<b>Final Order Date:</b>	06/12/78 (G W/C)	<b>Applicant:</b>	Bair
<b>Case #/Type:</b>	8022-g76LJ (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	05/14/76	<b>Examiner:</b>	Throm
<b>Hearing Date:</b>	10/26/77	<b>Use:</b>	Irrigation

**A-4.9395** [Hearing held upon expiration of temporary permit.] Nine foot draw-down not adverse effect.

**I-14.900**

<b>Final Order Date:</b>	06/14/78 (G W/C)	<b>Applicant:</b>	Palo
<b>Case #/Type:</b>	8772-c41QJ (C)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	06/30/76	<b>Examiner:</b>	Spaeth
<b>Hearing Date:</b>	03/04/77	<b>Use:</b>	Irrigation

A-4.9394 Tests indicated times when Muddy Creek water was extremely high in  
B-5.690 salts and probably should not be used in a sprinkler irrigation  
E-14.930 system. Condition added to restrict use for leaching prior to June 1  
T-5.800 and periods when salts are less than 1000 ppm. (Amended Proposal for  
Decision) Primary problem is not increased salinity of runoff, but  
harm to land on which water would be used. Condition added  
subjecting permit to future revision if it is found water quality of  
Muddy Creek is diminished substantially by this change, to the  
detriment of downstream appropriators.

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<b>Final Order Date:</b>	06/15/78 (D)	<b>Applicant:</b>	Treasure State Acres
<b>Case #/Type:</b>	12,203-ss41I (SS)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	04/13/77	<b>Examiner:</b>	Throm
<b>Hearing Date:</b>	02/24/78	<b>Use:</b>	Irrigation

A-4.9348.20 Application for sever and sell of water right. Applicant proposed to  
A-4.9348.00 move a water right on Ten Mile Creek upstream on Seven Mile Creek a  
E-22.480 tributary to Ten Mile Creek. Approval of application would cause an  
S-15.920 adverse effect on other water rights. Exhibit clearly demonstrated  
E-24.480 such a change would place applicant in a position to demand water  
regardless of Seven Mile Creek flows even though Ten Mile Creek  
would have had sufficient water to satisfy applicant's decreed  
rights from Ten Mile Creek.

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<b>Final Order Date:</b>	06/16/78 (D)	<b>Applicant:</b>	Roberts Loan & Cattle Co.
<b>Case #/Type:</b>	13648-s40A (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	06/24/77	<b>Examiner:</b>	Throm
<b>Hearing Date:</b>	03/30/78	<b>Use:</b>	Irrigation/stock

U-14.1259.00 There are unappropriated waters in the source during winter months,  
U-14.1274 at times of heavy spring runoff, and at other times of high-inten-  
A-4.930 sity, short-duration summer storms. However, without means to by-  
M-5.110 pass proposed reservoirs, applicant would preempt water supplies to  
the adverse effect of prior appropriators. Applicant failed to meet  
criterion of adequate means of diversion.

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<b>Final Order Date:</b>	06/16/78 (G W/C)	<b>Applicant:</b>	Koss
<b>Case #/Type:</b>	4234-s40E (P)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	11/25/74	<b>Examiner:</b>	Diemert
<b>Hearing Date:</b>	06/30/76	<b>Use:</b>	Irrigation

A-4.9321 The use of a mechanically regulated diverting device would adversely  
affect appropriators in that it would require their constant  
vigilance to protect their water rights. The proposed culvert should  
be installed at a level in the dike which will allow only excess  
waters to flow through.

E-22.480 Claims of prior interference with existing water rights are  
irrelevant to and beyond the scope of this hearing.

<b>Final Order Date:</b>	07/24/78 (G/WC)	<b>Applicant:</b>	Johnson
<b>Case #/Type:</b>	8329-76H (C)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	05/18/76	<b>Examiner:</b>	Throm
<b>Hearing Date:</b>	07/28/77	<b>Use:</b>	Irrigation/stock

A-16.7567 Application may be modified at hearing to reflect intent. Objectors  
E-24.480 present may be polled to determine if objections held for change.  
O-2.490 If no objectors withdraw. Hearing may be resumed to hear objections  
to amended application.

M-5.110 Concerns relating to safety and adequacy of existing structures  
E-24.480 should be brought before Dam Safety Section. ?  
P-18.720

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<b>Final Order Date:</b>	08/24/78 (G)	<b>Applicant:</b>	Oscar Quam Ranch
<b>Case #/Type:</b>	12276-s39FJ (P)	<b>Regional Office:</b>	Miles City
	12277-s39FJ (P)		
<b>Application Date:</b>	04/18/77	<b>Examiner:</b>	Throm
<b>Hearing Date:</b>	04/26/78	<b>Use:</b>	Stock

J-21.800 Held, application comes under exception to statute. No permit  
required.

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<b>Final Order Date:</b>	12/01/78 (G/C)	<b>Applicant:</b>	Schonenberger
<b>Case #/Type:</b>	10046-s41D (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	11/03/76	<b>Examiner:</b>	Throm
<b>Hearing Date:</b>	07/06/76	<b>Use:</b>	Irrigation
<b>Oral Argument Date:</b>	07/25/78	<b>O/A Examiner:</b>	Ferris

U-14.1259.00 Held although water is not available throughout the period requested  
U-14.1274 water was available some years during June and up to July 15.

A-4.9348.00 Held, because stream is decreed with a water commissioner to  
admeasure and distribute the water, granting of permit would not  
adversely affect the rights of prior appropriators.

M-5.110 Held applicant's intention to have plans and specifications approved  
by SCS constitutes adequate means of diversion. Granted. **Exceptions  
received.**

P-5.800 Final Order modified proposed order by granting a temporary permit  
A-4.930 for a three-year period to enable parties to document any adverse  
O-2.490 effects after which the documented data would be evaluated and a  
permit would be either modified, granted, or denied. **Appealed to  
district court.**

U-14.120 Court held finding of unappropriated water was "clearly erroneous."  
U-14.1259.00 No evidence was submitted by any party that suggested water in  
U-14.1274 excess of the decreed rights ever flows in Swamp Creek.  
E-22.480

M-5.110 Court held Department has no authority to approve an application  
J-21.800 without first requiring evidence of the adequacy of the means of  
D-21.310 diversion or its construction. When Department granted permit with-  
O-2.490 out first requiring evidence of the adequacy of the means of  
diversion or its construction, the objectors were denied their  
rights of cross-examination and rebuttal on those issues. Decision  
reversed.

<b>Final Order Date:</b>	12/01/78 (G W/C)	<b>Applicant:</b>	Montana Dept. of State Lands
<b>Case #/Type:</b>	4963-s41I (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	03/05/75	<b>Examiner:</b>	Gordon
<b>Hearing Date:</b>	05/03/76	<b>Use:</b>	Irrigation

D-21.310 Montana Power Company's subsequent motion to continue indefinitely, denied; denial of motion not denial of due process as Montana Power accorded all rights of other parties, and as it had sufficient notice to prepare for hearing.

E-24.4831 Bureau of Reclamation held to possess a valid use right to maintain 2,015,000 acre-feet of water in reservoir; this, over applicant's objection that bureau had not filed for right, and that not all stored water was used beneficially.

E-24.4831 Montana Power Company appears to be entitled to 900 (?) cfs over and above the flow passed by Canyon Ferry.

E-24.4831 Findings of special master in **Montana Power Co. v. Broadwater-**  
S-21.6621 **Missouri** not binding "precedent" as case was dismissed for lack of jurisdiction. The proper way to view findings herein is rather that of impartial expert testimony.

U-14.1259 There may be unappropriated water in source when both Montana Power Company and Bureau of Reclamation rights are satisfied, this period occurring in most years between April 4 and September 30 inclusive, especially April to July.

[Permit issued with conditions restricting applicant's right to divert to periods when Bureau of Reclamation and Montana Power have all their water.]

<b>Final Order Date:</b>	03/17/79 (G W/C)	<b>Applicant:</b>	Nyquist
<b>Case #/Type:</b>	12868-s76M (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	05/17/77	<b>Examiner:</b>	Tevebaugh
<b>Hearing Date:</b>	05/09/78	<b>Use:</b>	Wildlife/Stock Fire/Domestic

U-14.1259 Permit granted for high water period (throughout which unappropriated water was shown available) rather than period requested.

<b>Final Order Date:</b>	07/11/79 (G W/C)	<b>Applicant:</b>	Peterson
<b>Case #/Type:</b>	11454-c41C (C)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	02/23/77	<b>Examiner:</b>	Tevebaugh
<b>Hearing Date:</b>	06/01/78	<b>Use:</b>	Irrigation

E-24.4831 Motion to dismiss because Department would first have to make deter-  
J-21.800 mination regarding the existence and extent of water right denied.

J-21.800 Motion to dismiss for lack of jurisdiction due to expiration of 60 days denied.

<b>Final Order Date:</b>	01/07/80 (G W/C)	<b>Applicant:</b>	North Montana Feeders, Inc.
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<b>Case #/Type:</b>	18962-g410 (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	05/06/78	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	06/28/79	<b>Use:</b>	Stock

U-14.120            There are unappropriated waters in the source except in periods of drought. [Permit granted.]

<b>Final Order Date:</b>	02/08/80 (G W/C)	<b>Applicant:</b>	Thisted
<b>Case #/Type:</b>	13017-g41L (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	05/24/77	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	10/05/78	<b>Use:</b>	Irrigation

A-4.930            It is not certain that the rights of prior appropriators will be  
B-21.780            adversely affected. Held, criterion met.  
                      [Permit granted.]

<b>Final Order Date:</b>	02/26/80 (D)	<b>Applicant:</b>	Hensler
<b>Case #/Type:</b>	20886-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	10/31/78	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	09/06/79	<b>Use:</b>	Wildlife

M-5.110            Means of diversion inadequate because no provision to let water run through dam when required by down streamers.

U-14.1259           Water in Dry Gulch, including Bitterroot Irrigation District canal seepage is fully appropriated except during high runoff.

<b>Final Order Date:</b>	02/26/80 (D)	<b>Applicant:</b>	McTaggart
<b>Case #/Type:</b>	15251-s41I (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	09/19/77	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	11/20/79	<b>Use:</b>	Irrigation

E-22.480            Decree of court (1967) states that "at no time has there been, nor  
U-14.1259           is there now, more waters in Silver Creek and its tributaries than  
                      is sufficient to meet the requirements of plaintiff, except in times  
                      of high runoff water". Held, unappropriated water not available  
                      throughout proposed period of diversion. [Permit  
                      denied.]

<b>Final Order Date:</b>	02/27/80 (G W/C)	<b>Applicant:</b>	McTaggart
<b>Case #/Type:</b>	16322-s41I (C)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	12/07/77	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	11/20/79	<b>Use:</b>	Irrigation/Stock

A-4.9348.10        Acre for acre change in place of use will not adversely affect other users on source. [Change authorized.]

<b>Final Order Date:</b>	03/06/80 (G W/C)	<b>Applicant:</b>	Woronik
<b>Case #/Type:</b>	18516-s40J (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	05/03/78	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	11/13/79	<b>Use:</b>	Irrigation

L-1.790            Although three applications may total more than 15 cfs because applicant has stated that the same pump will be used to exercise the two applications for 11 cfs, the amount of water diverted at any time will be less than 15 cfs. Therefore, clear and convincing criteria need not be met.

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<b>Final Order Date:</b>	03/06/80 (G W/C)	<b>Applicant:</b>	Woronik
<b>Case #/Type:</b>	18518-s40J (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	05/03/78	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	11/13/79	<b>Use:</b>	Irrigation

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L-1.790            Although three applications may total more than 15 cfs because applicant has stated that the same pump will be used to exercise the two applications for 11 cfs, the amount of water diverted at any time will be less than 15 cfs. Therefore, clear and convincing criteria need not be met.

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<b>Final Order Date:</b>	03/06/80 (G W/C)	<b>Applicant:</b>	Woronik
<b>Case #/Type:</b>	18519-s40J (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	05/03/78	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	11/13/79	<b>Use:</b>	Irrigation

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L-1.790            Although three applications may total more than 15 cfs because applicant has stated that the same pump will be used to exercise the two applications for 11 cfs, the amount of water diverted at any time will be less than 15 cfs. Therefore, clear and convincing criteria need not be met.

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<b>Final Order Date:</b>	03/31/80 (G W/C)	<b>Applicant:</b>	Drum Land & Livestock
<b>Case #/Type:</b>	16340-s76L (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	10/04/89	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	12/05/79	<b>Use:</b>	Irrigation

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E-24.4848            Indian rights involved. [Stipulation reached; permit issued with conditions.]

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<b>Final Order Date:</b>	04/02/80 (G W/C)	<b>Applicant:</b>	Allen, Lloyd
<b>Case #/Type:</b>	15719-g41K (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	10/17/77	<b>Examiner:</b>	Tevebaugh
<b>Hearing Date:</b>	11/02/78	<b>Use:</b>	Irrigation

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E-24.4831            Until adjudication of water rights completed, Department must accept all claims of existing water rights at face value. [FO]

E-24.4831            The right to claim subirrigation was recognized prior to 1973.  
M-5.1188            Department must recognize claims of water rights relative to laws which existed at the time the claims were filed. [FO]

O-2.490            Motion to strike objections to permit denied. Although they contain errors, objections still do have substance.

U-14.1274            The record contained evidence that aquifer might produce sufficient water to supply applicant.

[Interim (temporary) permit granted.]

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<b>Final Order Date:</b>	04/15/80 (D)	<b>Applicant:</b>	Campbell
<b>Case #/Type:</b>	19535 -s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	07/18/78	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	12/18/79	<b>Use:</b>	Irrigation

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A-16.7576            Although water could be used in greenhouse in January, application for summer months only. Cannot extend period without republishing.  
D-21.780            [FO]

**B-5.690** Although garden use is beneficial, cannot beneficially use if can only water in spring. [FO]

**R-5.930** Proposed order cannot be altered by a change in testimony submitted after the record is closed. [FO]

**U-14.1259** Although stream dries up between applicant and objectors, there is subsurface flow below stream bed which does supply objectors. Thus, applicant's assertion that water he wishes to appropriate would not make it to objectors anyway unfounded, and fact that objectors need all the water they can get shows that all stream water is appropriated.

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<b>Final Order Date:</b>	04/15/80 (D)	<b>Applicant:</b>	Campbell
<b>Case #/Type:</b>	20682-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	09/19/78	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	12/18/79	<b>Use:</b>	Irrigation

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**A-16.7576** Although water could be used in greenhouse in January, application for summer months only. Cannot extend period without republishing. [FO]

**D-21.780**

**B-5.690** Although garden use is beneficial, cannot beneficially use if can only water in spring. [FO]

**R-5.930** Proposed order cannot be altered by a change in testimony submitted after the record is closed. [FO]

**U-14.1259** Although stream dries up between applicant and objectors, there is subsurface flow below stream bed which does supply objectors. Thus, applicant's assertion that water he wishes to appropriate would not make it to objectors anyway unfounded, and fact that objectors need all the water they can get shows that all stream water is appropriated.

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<b>Final Order Date:</b>	04/15/80 (D)	<b>Applicant:</b>	Campbell
<b>Case #/Type:</b>	20683-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	09/19/78	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	12/18/79	<b>Use:</b>	Irrigation

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**A-16.7576** Although water could be used in greenhouse in January, application for summer months only. Cannot extend period without republishing. [FO]

**D-21.780**

**B-5.690** Although garden use is beneficial, cannot beneficially use if can only water in spring. [FO]

**R-5.930** Proposed order cannot be altered by a change in testimony submitted after the record is closed. [FO]

**U-14.1259** Although stream dries up between applicant and objectors, there is subsurface flow below stream bed which does supply objectors. Thus, applicant's assertion that water he wishes to appropriate would not make it to objectors anyway unfounded, and fact that objectors need all the water they can get shows that all stream water is appropriated.

<b>Final Order Date:</b>	05/02/80 (D)	<b>Applicant:</b>	Leister
<b>Case #/Type:</b>	13503-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	06/20/77	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	02/05/80	<b>Use:</b>	Irrigation

A-16.750      Department's failure to act on application within 180 days does not  
J-21.800      result in denial of application.  
S-21.660

U-14.120      Applicant presented no evidence that there are unappropriated waters  
in the source or that prior appropriators would not be affected.  
Concluded there are no unappropriated waters in source and that  
prior appropriators would be adversely affected.

[Permit denied.]

<b>Final Order Date:</b>	05/02/80 (D)	<b>Applicant:</b>	O'Connor
<b>Case #/Type:</b>	18860-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	05/18/78	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	02/05/80	<b>Use:</b>	Irrigation/Domestic

U-14.120      Applicant presented no evidence that there is unappropriated water  
in the source of supply. [Permit denied.]

<b>Final Order Date:</b>	06/23/80 (G W/C)	<b>Applicant:</b>	Runestad, Jr.
<b>Case #/Type:</b>	17881-g40A (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	03/07/78	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	03/11/80	<b>Use:</b>	Irrigation

S-15.920      A spring is ground water if its natural flow is increased by some  
development at its point of extrusion. An undeveloped spring is  
surface water. [FO]

<b>Final Order Date:</b>	06/23/80 (D)	<b>Applicant:</b>	Law
<b>Case #/Type:</b>	19244-c76H (C)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	06/11/78	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	04/23/80	<b>Use:</b>	Irrigation

A-16.7576      [Application improperly noticed to change portion of filed  
appropriation rather than portion of decreed right. Application  
dismissed.]

<b>Final Order Date:</b>	09/30/80 (G W/C)	<b>Applicant:</b>	Papez
<b>Case #/Type:</b>	19569-s43B (P)	<b>Regional Office:</b>	Billings
	19570-s43B (P)		
<b>Application Date:</b>	07/20/78	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	06/18/80	<b>Use:</b>	Fish and wildlife

U-14.1259.70      Initial fill of fish reservoir consumptive. Rest of appropriation is  
flow through. Initial fill will be in high water period when there  
is plenty of water in source. Rest of year water is nonconsumptively  
used. Held, § 85-2-311(1)(a), MCA, fulfilled.

<b>Final Order Date:</b>	10/01/80 (G W/C)	<b>Applicant:</b>	Bair
<b>Case #/Type:</b>	8022-g76LJ (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	05/14/76	<b>Examiner:</b>	Throm
<b>Hearing Date:</b>	06/26/80	<b>Use:</b>	Irrigation

I-14.900 [Hearing held upon expiration of temporary permit.] Nine foot drawdown not adverse effect.

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<b>Final Order Date:</b>	10/14/80 (G W/C)	<b>Applicant:</b>	Bradshaw
<b>Case #/Type:</b>	13180-g76L (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	06/02/77	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	06/27/80	<b>Use:</b>	Irrigation

A-4.9395 Objectors draw from shallow aquifer; applicants will be from deeper  
T-5.800 aquifer. Although the degree of hydrologic connection between the  
aquifers is uncertain, concluded there will be no adverse effect if  
applicant's well is grouted to preclude drawing from shallow  
aquifer.

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<b>Final Order Date:</b>	10/27/80 (D)	<b>Applicant:</b>	Carpenter
<b>Case #/Type:</b>	15964-s76L (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	10/11/77	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	07/17/80	<b>Use:</b>	Irrigation

U-14.120 May be unappropriated water in source, but not in amount requested  
and not throughout requested period. [Permit denied.]

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<b>Final Order Date:</b>	11/21/80 (G W/C)	<b>Applicant:</b>	Ashley Irrigation Dist.
<b>Case #/Type:</b>	14607-ss76LJ (S)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	08/31/77	<b>Examiner:</b>	Sandquist
<b>Hearing Date:</b>	02/20/80	<b>Use:</b>	Irrigation

A-4.930 Objection that cessation of use of ditch will result in death of  
B-5.6934 riparian vegetation and deletion of water supply to wildlife is not  
P-18.720 sufficient to deny sever/sell.

A-4.930 Applicant's sale of water right to Fish, Wildlife and Parks right  
I-14.870 to be stored and released into Ashley Creek to provide instream  
flows, and to dilute sewage discharge will not adversely affect the  
rights of others.

E-24.4831 Objector does not have right to use ditch water merely because he is  
riparian to ditch.

E-24.4831 Examiner does not have jurisdiction to adjudicate water rights;  
J-21.800 therefore, for purposes herein only, it is determined that applicant  
has valid water claims as discussed above.

P-18.720 There may be adverse effects from sale to user for "irrigation and  
rejuvenation" as overflows and discharges from the impoundment  
cannot be adequately regulated given the present design, and  
discharges into the old channel, in its present unimproved condition  
may adversely affect the rights of others adjacent to old channel  
(by flooding their properties).

[Sever/sell approved for all grantees with conditions to prevent  
flooding.]

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<b>Final Order Date:</b>	12/04/80 (G W/C)	<b>Applicant:</b>	Chase
<b>Case #/Type:</b>	24404-s76G (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	08/31/79	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	09/15/80	<b>Use:</b>	Irrigation

A-4.930 Except during spring runoff, West Fork of Cramer Creek water

S-15.920 disappears into alluvium one mile above confluence with Cramer  
U-14.1259 Creek. Held, water taken from West Fork would not be available to Cramer Creek users during that irrigation season. [Held, Cramer Creek users cannot be adversely affected by applicant's diversion of West Fork water.]

U-14.1259 There is at least a trickle of water passing the last point of diversion used by objectors throughout the summer. [Held, there is unappropriated water available?]

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<b>Final Order Date:</b>	12/12/80 (D)	<b>Applicant:</b>	Russell & Rumph Ranch
<b>Case #/Type:</b>	25477-s42J (P)	<b>Regional Office:</b>	Miles City
<b>Application Date:</b>	11/05/79	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	10/08/80	<b>Use:</b>	Irrigation

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U-14.1259 Objector's prior right has not been filled since 1971. Held, no unappropriated water available. [Permit denied.]

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<b>Final Order Date:</b>	12/15/80 (D)	<b>Applicant:</b>	Town of Joliet
<b>Case #/Type:</b>	18506-c43D (C)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	04/26/78	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	05/19/80	<b>Use:</b>	Irrigation

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A-4.9348.00 Town of Joliet and Joliet Cemetery District both claim the same 35 inch right, which cemetery has used (exclusively) since 1956. Held, cannot grant proposed change (because use of right by both would increase source depletion?). [Change denied.]

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<b>Final Order Date:</b>	12/30/80 (G W/C)	<b>Applicant:</b>	Kyler
<b>Case #/Type:</b>	22047-g41E (P)	<b>Regional Office:</b>	Helena
	22048-g41E (P)		
<b>Application Date:</b>	03/07/79	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	07/15/80	<b>Use:</b>	Irrigation

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(See also 22047-g41E transferred to Shervin.)

A-4.9383 Because of clay lenses and high aquifer transmissivity, it is concluded that there will be no substantial effect on stream flow caused by applicant's well. [FO]

A-4.9383 In order for ground water not to be "part of the surface water,"  
S-15.920 there must exist a nonsaturated intervening layer between the surface water source and the point of withdrawal of the subsurface waters.

P-5.800 Appropriation of water without a water right does not preclude  
S-21.660 subsequent issuance of permit for such appropriation.

S-15.920 Subsurface water source must be closely interconnected with surface to be considered part of surface water. [FO]

A-16.7516 No provision in Montana law that a person must own land to apply for  
S-20.110 a water right.

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<b>Final Order Date:</b>	02/20/81 (D)	<b>Applicant:</b>	Wallace
<b>Case #/Type:</b>	7264-s43D (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	?	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	10/30/80	<b>Use:</b>	Irrigation

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J-21.800 Once a final order has been issued, the Department is without  
R-5.930 jurisdiction to "rehear" case (unless final order reserves  
jurisdiction). [Discussion in document entitled "reasons of hearings  
examiner".] [Dismissed.]

<b>Final Order Date:</b>	05/21/81 (D)	<b>Applicant:</b>	Thomas H. Boone, Trustee
<b>Case #/Type:</b>	14965-g41E (P) 19230-c41E (C)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	08/26/77	<b>Examiner:</b>	Sandquist
<b>Hearing Date:</b>	08/08/79	<b>Use:</b>	Irrigation

A-4.930 Examiners not concluding no adverse effect sustained.  
R-5.930 [FO]

A-4.930 Subjecting permit to prior rights would not be an effective  
T-5.800 condition to protect same because the boundaries and interrelation-  
ships of the Boone water supply are unknown, and because of the time  
delay between diversion and effect on the source.

A-4.9325 This appropriation would result in depletion and diminution of  
U-14.120 Boulder River; however, the depletion may not be evident for 15 to  
60 days after the actual diversion.

A-4.9348.10 Change proposed to increase irrigation of 97-340 acres to 838 acres  
A-4.9379 will decrease the amount of return flow and recharge water to the  
Boulder River, thereby adversely affecting the rights of other  
appropriators in the Boulder River system.

A-4.9348.48 An appropriator is entitled to a change of use if the new use will  
not consume a greater amount of water than was previously consumed  
by the old use.

A-4.9379 Finding that return flows would be diminished sustained although  
E-22.480 predicated on opinion. [FO]

A-16.7567 Motion to amend application at hearing denied.  
D-21.310

B-21.780 Applicant has burden of proof by a preponderance of the evidence as  
to the criteria.

B-21.780 Claimant of developed water has historically had the burden of  
U-14.1259.25 proving such water is in fact developed.

E-24.480 To limit Montana Power Company's right to store water in Canyon  
J-21.800 Ferry to only times when water was released from Hebgen Lake would  
constitute an adjudication; held, Department has no jurisdiction.  
[FO]

E-24.4831 Findings in **Montana Power Co. v. Broadwater-Missouri** are not binding  
S-21.676 (**res judicata**) as the case was dismissed on appeal for lack of  
jurisdiction. [FO]

E-24.4831 [Montana Power Company and Bureau of Reclamation rights discussed.]

E-24.4831 Montana Power Company's storage rights recognized and protected in  
S-20.720 Conclusion of Law #10. [FO]

I-14.900 Interim permit denied because there was not substantial evidence that the criteria for issuing a regular permit could be met.

J-21.800 An agency's adoption of rules cannot operate to amend statutory provisions. Therefore, to extent ARM definition of surface water does this, it would be invalid. [FO]

L-1.940

J-21.800 Prehearing motion to district court for writ of prohibition (to prevent Department from acting on applications) denied by district court. The 60-day statutory limit is directory, not jurisdictional.

S-21.660

L-1.940 Policy of state to encourage wise use of water must be balanced against the rights of prior appropriators.

M-5.110 Means of diversion not adequate to divert requested flow.

R-5.930 Examiner correct in characterizing a portion of the pit waters as connected with surface waters. [FO]

S-15.920

S-15.920 Montana has adopted the subflow doctrine for appropriations of water which comprises the subsurface flow or source for a stream, lake, or river, **i.e.**, that these form a natural part of the source and that appropriation thereof must fall on the ladder of priorities thereon.

S-15.920 The phrase "not part of the surface water" excludes from groundwater waters which contribute directly to the source, or indirectly by providing storage, pressure head, or gradient so that surface flow can be sustained at the historic levels.

S-15.920 For groundwater to not be a part of the surface, there must exist a nonsaturated intervening layer between the surface water source and the point of withdrawal of the subsurface waters.

S-15.920 Subsurface waters which contribute directly or indirectly to surface flows are part of the surface source.

S-15.920 Waters proposed to be diverted here by pit are interrelated to the flows to the north channel of the Boulder River; therefore, the waters to be diverted include an unknown quantity of surface water.

S-15.920 When the evidence is weighed, it is found that there is substantial evidence to support a finding that the north channel of the Boulder River is a natural channel of the Boulder. [FO]

S-15.920 The north channel has a defined bed and banks and therefore the definition of the water course in **Doney v. Beatty** is not applicable. [FO]

S-21.920 Application of subflow doctrine sustained. [FO]

U-14.1259 Water only available for appropriation when Canyon Ferry spills.

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<b>Final Order Date:</b>	06/09/81 (G W/C)	<b>Applicant:</b>	Schuler Ranch
<b>Case #/Type:</b>	29495-s410 (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	07/03/80	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	02/09/81	<b>Use:</b>	Irrigation

B-21.7835 Burden on applicant is to demonstrate criteria by a preponderance of the evidence.



L-1.940 Corporation is a person within meaning of the act.

U-14.1259 Applicant failed to prove that unappropriated water exists throughout the requested period of appropriation. However, if permit is conditioned to require 50 cfs bypass flow, there will be no adverse effect to objectors.

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<b>Final Order Date:</b>	06/10/81 (G W/C)	<b>Applicant:</b>	Ray Habel, Inc.
<b>Case #/Type:</b>	25445-s410 (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	11/28/79	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	02/09/81	<b>Use:</b>	Irrigation

T-5.800 Unappropriated water will not be available throughout the proposed  
U-14.120 period of diversion. However, it is always available when the flow at Kerr Bridge Gaging Station exceeds 50 cfs. Period of diversion restricted to when flow at Kerr Bridge exceeds 50 cfs. [Permit granted.]

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<b>Final Order Date:</b>	06/19/81 (G W/C)	<b>Applicant:</b>	Marstaeller
<b>Case #/Type:</b>	17907-s40A (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	03/10/78	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	11/13/80	<b>Use:</b>	Irrigation

U-14.1259 The entire 215 acre-feet of water physically available is not necessarily unappropriated water. There are existing irrigation and stock rights downstream.

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<b>Final Order Date:</b>	06/19/81 (D)	<b>Applicant:</b>	Marstaeller
<b>Case #/Type:</b>	20365-s40A (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	06/05/78	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	11/13/80	<b>Use:</b>	Irrigation

U-14.1259.0 Applicant submitted several applications. In this case the water  
S-15.920 requested had already been spoken for by another application  
A-4.930 submitted by applicant for the same source. If both applications were granted there would be an adverse effect to downstream users.

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<b>Final Order Date:</b>	06/19/81 (G w/C)	<b>Applicant:</b>	Marstaeller
<b>Case #/Type:</b>	20366-s40A (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	06/05/78	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	11/13/80	<b>Use:</b>	Irrigation

U-14.1259.00 Applicant unable to show unappropriated waters in the source of  
U-14.1274 supply throughout the proposed period of use. Permit granted with  
E-22.480 truncated period of use.

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<b>Final Order Date:</b>	06/24/81 (G W/C)	<b>Applicant:</b>	Vasilchek
<b>Case #/Type:</b>	23106-s76M (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	06/11/79	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	03/20/81	<b>Use:</b>	Domestic

A-4.930 The fact that this application may be the first of many such requests is immaterial.

A-4.930 There is no requirement that an applicant seeks water from a source  
A-16.750 of supply that is more convenient to objector than the one sought.

B-5.6979 Amount requested excessive for use described.

E-24.4879 Loss of even great amounts of water out of unlined ditch does not

W-1.870 necessarily render objector's means of diversion wasteful as a matter of law.

U-14.1259 Applicant failed to prove water available during summer, as objector's irrigation uses require the entire flow of Seven Mile Creek.

[Permit issued in part; denied in part.]

Final Order Date:	Est. 06/81	Applicant:	Parker
Case #/Type:	12893-g76GJ (R)	Regional Office:	Missoula
Application Date:	N/A	Examiner:	Williams
Hearing Date:	03/27/81	Use:	Irrigation

B-21.780 In revocation, Department has the burden to produce evidence such that reasonable minds may differ as to whether sufficient grounds exist for revocation. Permittee bears the burden of persuasion by a preponderance of the evidence.

D-21.310 Neither Department nor applicant had received notice of improprieties issue; applicant would be prejudiced by its inclusion.

E-22.480 Evidence propounded by **amicus** re alleged Department improprieties in issuing a "corrected provisional permit" stricken as outside the scope of the proceeding, which scope is properly defined by the Department

J-21.800 Proper forum for resolution of improprieties in issuing permit initially in district court.

O-2.490 Intervenor allowed in revocation proceeding as **amicus curiae** as countenanced by § 2-4-602(7), MCA.

P-5.8031 Unnecessary to decide here whether mere failure to file notice of completion would in itself work a forfeiture of permit.

P-5.8031 Permittee must show reasonable diligence in order to preserve relation back of priority date to date of application.

P-5.8031 The basic criterion of reasonable diligence requires a **bona fide** intent to complete the appropriation with all the expedition and constant effort to accomplish the undertaking which is common to reasonable men who desire prompt accomplishments of their appropriative plans. It is a question of fact.

P-5.8031 There was a flurry of well drilling activity in 1977. However, nothing was done to complete the appropriation over the next three years. Nothing in the record indicates that permittee did not divert because he did not need the water or because diversion would adversely affect other appropriators.

P-5.8031 Claims of lack of financial means to complete an appropriation have been subjected to strict scrutiny by the courts.

P-5.8031 Cost of pump mechanism was anticipated by appropriator at time of filing application. While matters incidental to the enterprise itself that cannot be reasonably avoided may excuse utmost diligence in some circumstances, matters such as this purely personal to the appropriator, cannot work an exception to the rule requiring due diligence.

[permit revoked]

<b>Final Order Date:</b>	07/01/81 (G W/C)	<b>Applicant:</b>	Kenyon-Noble Ready Mix Co.
<b>Case #/Type:</b>	24591-g41H (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	09/25/79	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	04/07/81	<b>Use:</b>	Commercial

**A-4.9395** Reduction in ground water supply by matter of inches is not adverse effect.

**A-16.7567**  
**A-16.7576**  
**D-21.310** Parties who did not object to modification of application made at hearing are not denied due process by acceptance of such modifications. However, as application is substantially different, notice must be republished to provide opportunity to object to those who had not objected to the application as initially published.  
[Discussion.]

**A-16.7567** The priority date of the permit issued shall be the date and hour of the making of substantial modifications to the application at the hearing, and not the original date of filing of the application.  
[Discussion.]

**B-5.690** Gravel washing is a beneficial use of water.

**B-5.6979** To command 12 cfs up to 6560 acre-feet per year merely to provide a means of diverting 700 gpm up to 237 acre-feet per year is unreasonable and will result in a waste of water resources.

**E-22.480**  
**P-18.720** Assuming without deciding that a rise in water table level would be adverse effect, the examiner concludes that the evidence does not support such a claim. Even more striking evidence based on coincidence has been denied probative value in related ground water contexts.

**I-14.900**  
**J-21.800** Evidence is sufficient to grant an interim permit. Permit not required for, and not appropriate for, dewatering of gravel pit where water only to be gotten rid of, and not beneficially used.  
[Discussion - **See also** FO.]

**J-21.800**  
**S-21.660** Department exceeding statutory time for hearing arguments on permits does not mandate issuance of permit.

**U-14.1259.70** Gravel washing is a nonconsumptive use.

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<b>Final Order Date:</b>	07/01/81 (G W/C)	<b>Applicant:</b>	Griff
<b>Case #/Type:</b>	25534-d76H (C)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	12/03/79	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	03/30/81	<b>Use:</b>	Irrigation

**A-4.930** "Opening the floodgates" (granting one will encourage other applications) is not adverse effect.

**A-4.930** Injury due to present conditions on the source, not due to change per se, not relevant in this proceeding.  
  
[Change authorized.]

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<b>Final Order Date:</b>	08/10/81 (G W/C)	<b>Applicant:</b>	Harrington & Bibler, Inc.
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<b>Case #/Type:</b>	17743-s76LJ (P) 15948-s76LJ (C)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	02/17/78	<b>Examiner:</b>	Sandquist
<b>Hearing Date:</b>	02/25/80	<b>Use:</b>	Irrigation

**A-4.930**  
**U-14.1259** The rights of a prior appropriator will not be adversely affected since the proposed appropriation for lake rejuvenation is not during the irrigation season, and because the permit will be subject to prior rights.

**A-4.9392** There will be no adverse effect due to change of place of diversion, place of use, and purpose of use if design of impoundment changed so that it can be adequately regulated, and so that overflow channel is designed to prevent flooding of church crawl space.

**B-5.690**  
**E-22.490** Montana legislature has not established a preference system. Lake rejuvenation is a beneficial use.

[Permit issued with conditions.]

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<b>Final Order Date:</b>	08/19/81 (DIS)	<b>Applicant:</b>	Warfel
<b>Case #/Type:</b>	22632-s41G (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	05/04/79	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	None	<b>Use:</b>	Irrigation

**A-16.7516**  
**S-21.6625** Cannot hold priority date indefinitely by delaying final disposition of permit by having several "good excuses" for not attending hearing.

[Dismissed for failure of applicant to respond to setting of hearing.]

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<b>Final Order Date:</b>	09/15/81 (D)	<b>Applicant:</b>	Graveley LD Ranch
<b>Case #/Type:</b>	26661-c41I (C) 26662-c41I (C)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	02/25/80	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	11/17/80	<b>Use:</b>	Irrigation

**A-4.9348.10** Applicant applied to expand place of use from 554 acres to 847 acres, but did not prove that this would not increase the consumptivity of the use. Held, this not change, but is new appropriation, which would adversely affect other appropriators if granted as change.

**A-16.7516** Motion to dismiss because water to be used on state-owned lands denied. Applicant had lease.

**A-16.7567** Application is to change place of use not point of diversion. Objection to motion to correct legal description of point of diversion set forth in application overruled.

**E-22.480** Testimony admitted even though the data supporting estimate of efficiency not offered.

**E-24.4831**  
**J-21.800** A portion of the right to be changed is not recognized in the Confederate Creek decree. Held, disputed changes in water right made prior to Water Use Act, and Department has no jurisdiction to determine validity of these changes. Therefore, water rights accepted here as stated.

[Applications denied.]

<b>Final Order Date:</b>	Est. 09/81 (D)	<b>Applicant:</b>	City of Helena
<b>Case #/Type:</b>	19084-s41I (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	06/13/78	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	07/31/81	<b>Use:</b>	Municipal

  

**A-4.9319** It is not incumbent on appropriator to use most efficient means of diversion. Thus, mere fact that waters run by any particular

**E-24.4879** diversion point does not in and of itself establish the existence of

**M-5.110** unappropriated water. These waters may be necessary for carriage to

**U-14.120** point of diversion.

  

**A-4.9348.00** A municipal entity has no special status as regards its needs for

**U-14.1259** water, and may not enlarge its appropriation to the detriment of other appropriators. [FO]

  

**A-4.9379** Return flows (from sewage treatment) are part and parcel of stream

**E-24.480** conditions. Therefore, when objectors herein began using applicant's

**W-1.870** waste waters, their appropriations embraced this source of supply. [FO]

  

**A-4.9394** Although mismanagement of facilities could cause pollution of Helena Valley Canal, such deleterious effect is not the inevitable consequence of applicant's plan. It is entirely speculative that such mismanagement will occur. Held, no adverse effect to canal.

  

**A-16.7516** Although place of use owned by city-county airport, and irrigation

**B-5.690** will be controlled by this authority, the city has been acting with reference to this application at least in part by direction of the airport. Held, application may be processed, as beneficial use will not be frustrated by actions of airport authority, and even if it is, the permit would not be perfected.

  

**B-21.780** It is unreasonable to accord applicants the duty to invest

**U-14.120** sufficient funds such that every detail of the proposed appropriation is flushed out in circumstances where the actual amount of water made available might cause substantial reworking of plans.

  

**D-21.310** Change of statutory language does not preclude using new version of

**E-22.480** statute, as change merely clarifies former legislative intent.

  

**E-22.480** While additions to amounts historically diverted by objectors may

**E-24.480** affect priority dates, this is in no way relevant as applicant is junior to even such new uses.

  

**E-24.480** On adjudicated streams, after 1921, appropriations not in compliance with the 1921 statute must defer to later appropriations made in compliance.

  

**E-24.480** Whether an appropriator who has historically solely devoted his

**J-21.800** water to grain production can convert his operations to more water intensive hay production without applying to Department for change need not be decided. Objector may well have irrigated alfalfa in the past.

  

**E-24.4831** While prior appropriators' claims extend only to the natural flow of

**S-15.920** the source of supply as of the time of their appropriation, subsequent additions to this source generated by runoff from the use of foreign waters may form the basis for a new appropriation of the same by those existing appropriators. [FO]

**E-24.4894**  
**S-15.920**  
**U-14.1259.25** Although the ultimate source of objector's supply appears to derive from points foreign to the natural drainage, this trans-basin aspect of the existing diversion of the applicant is not availing in these circumstances. The right of the applicant extends only to the amount of the original beneficial use, and he may not reuse the water to the detriment of those who had come to depend on this source in the new drainage. [FO]

**S-15.920** Source of supply is sewage effluent.

**U-14.1259** Downstream objector utilizes all effluent (presently returned to source). Held, no unappropriated water.

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<b>Final Order Date:</b>	10/06/81 [26720, 26722 (D); (26718, 26723 (G w/C)) [26719 Granted In Part/Denied in Part]	<b>Applicant:</b>	Meadow Lake Country Club Est
<b>Case #/Type:</b>	(a) 26718-s76LJ (P) 26719-c76LJ (C) 26720-c76LJ (C) (b) 26722-s76LJ (P) (c) 26723-s76LJ (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	(a) 11/13/79 (b) 05/13/80 © 01/02/80	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	04/02/81	<b>Use:</b>	Irrigation

**A-4.930**  
**U-14.120** There is plenty of water available for all in May and June and nothing in the record indicates that diversion by applicant during that period will cause water depletion in later months.

**A-4.9321**  
**U-14.120** A reading of "injury" that precludes even the possibility of interference between permittee and prior appropriator proves to be too much. In effect, it argues that water availability must be proven even for the driest year. However, this interpretation would obviate the need for prioritizing new rights, while simultaneously resulting in the waste of vast quantities of water in wetter years. Held, having to hire water commissioner (or call source) more often not adverse effect.

**A-16.7516**  
**J-21.800** Mere rerouting of creek across property held not an appropriation within meaning of Water Use Act as there is no intent to divert, impound, or withdraw water. Thus, Department has no jurisdiction to grant permit therefor, and neither does applicant have requisite intent to appropriate.

**B-5.690** Irrigation of golf course is beneficial use of water.

**B-5.6979**  
**S-20.720** Applicant may not take storage remaining at end of irrigation season and credit it to next year's appropriation, **i.e.**, as applicant is entitled hereunder to only 33 acre-feet per annum if he has ten acre-feet remaining in storage at the end of the irrigation season, he may only appropriate 23 acre-feet of water the next year.

**B-21.780** Applicant must prove that it is more likely than not that statutory criteria exist.

**B-21.780** Applicant must demonstrate the existence of a water right to be

**E-24.4831** changed, and Department is empowered to make such a determination for purposes of implementation of statute, which determination is not an adjudication of the right. [Discussion.]

**E-22.480**  
**E-24.4831** Filing of declaration of vested groundwater is **prima facie** evidence of the right only if filing exactly comports with statutory requirements.

**E-24.4831** Filing did not comport with statutory requirements and no other evidence in record showing existence or extent of right. Held, applicant failed to establish existing water right alleged by applicant.

**S-15.920**  
**U-14.1259** Sewage effluent source would not augment source of supply at the time and place of need of any objectors hereto. Held, effluent is unappropriated and its diversion will not adversely affect objectors.

**S-20.720** One-fill (of storage reservoir) rule not applicable in Montana. Therefore, permit may be granted which countenances several refills.

**S-20.720**  
**W-1.870** Storage evaporation losses are chargeable to the appropriation. Therefore, even though applicant may lose water from storage, he may not make that up by exceeding the 33 acre-feet he may divert hereunder.

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<b>Final Order Date:</b>	12/04/81 (G W/C)	<b>Applicant:</b>	North Boulder
<b>Case #/Type:</b>	4501-s41E (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	12/30/74	<b>Examiner:</b>	Gordon
<b>Hearing Date:</b>	12/15/76	<b>Use:</b>	Irrigation

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**A-4.930** Applicant can claim no protection for its own uses based on infringements by other water users. [FO]

**A-4.930** Objector's beneficial water use will be destroyed by inundation of his land. This is an adverse effect. However, permit may still issue with condition that no water may be impounded by applicant unless and until objector's water rights are purchased or condemned by applicant. [FO]

**A-4.930**  
**T-5.800** Permit will be conditioned to protect water rights of objector and if interference with such rights is an unavoidable consequence of the proposed appropriation, applicant will have to contract with objector, condemn the water right, or abandon the project.

**A-4.930**  
**U-14.1259** Fact that appropriation is small does not make interferences with larger appropriation so trifling as to not be adverse. [FO]

**A-4.9348.20**  
**M-5.110** Applicant may not draw more water from Boulder River than is released from storage, and must deduct carriage losses along stretch of river used as carrier. [FO]

**A-4.9373** This diversion may actually benefit objector Montana Power Company by evening flows in river system so that Montana Power will get more water when actually needed. However, this does not justify the concomitant reductions during high flow if these have been relied on by Montana Power historically. [FO]

**B-5.690** If applicant fails to garner sufficient landowner support to implement the use of the full requested 12,000 acre-feet per year, this appropriative attempt will lapse **pro tanto** according to the deficiencies in the size of the place of use. [FO]

**B-5.690** Recreational use of dead storage plus active storage held beneficial. [FO]

**B-5.690** Evidence herein fails to indicate how applicant intends to use the water for "sediment" purposes; therefore, whether such use is beneficial cannot be determined. [FO]

**B-5.690** Benefits from project significantly outweigh costs. [FO]  
**L-1.790**

**B-5.6979** Carryover storage must be counted as part of next year's  
**S-21.720** diversion. [FO]

**B-21.6979** An appropriator may not escrow additional water in source to compensate for future diminution of size of reservoir due to sedimentation. [FO]

**B-21.6979** Applicant may not fill and refill storage unit so as to exceed the  
**W-1.870** appropriative limit stated on permit in order to offset evaporative, seepage, and carriage losses. [FO]

**B-21.780** Objectors have the burden of going forward with sufficient evidence  
**E-24.4831** such that reasonable minds may differ as to the scope and extent of their water rights. Unsworn conclusory statements do not suffice for this purpose. [FO]

**B-21.780** Applicant's burden to provide "clear and convincing" evidence does  
**L-1.790** not extend to negating each and every allegation filed in each and every objection. An applicant cannot be expected to in essence adjudicate a stream system. [FO]

**E-22.480** Bureau of Reclamation may not salvage its proof of its rights by  
**E-24.48** attempting incorporation of findings in another department matter; naked hearsay, especially in a manner that did not proceed to permit, cannot provide sufficient basis for a finding on a pivotal issue. However, this does not foreclose the possibility of use of findings in future matters. [FO]

**E-24.4831** Evidence in record with respect to use by Bureau of Reclamation (claims) is insufficient to prove rights. [FO]

**J-21.800** Real property rights, eminent domain, and service contracts not within jurisdiction.

**J-21.800** Through the prosecution of the proper action, in the proper forum, a water right may be legally condemned. This, however, is not the proper forum.

**J-21.800** Nothing herein authorizes applicant to inundate applicant's land. [FO]

**P-5.8021** Seven years to complete is reasonable estimate. [FO]

**R-5.930** [Finding #14 stricken on review; further findings added. Conclusion 1 not adopted; further conclusions added.]

**T-5.800** Objector Montana Power Company's hydropower rights only satisfied  
**U-14.1259** when Cochran Dam is spilling. Therefore, applicant may only divert at times Cochran Dam is spilling. [FO]



U-14.120 Unappropriated water available only during spring runoff. The period of April 1 to August 15 must be excised from permit. [FO]

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<b>Final Order Date:</b>	12/17/81 (G W/C)	<b>Applicant:</b>	Hammell
<b>Case #/Type:</b>	24668-s76LJ (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	09/25/79	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	09/09/81	<b>Use:</b>	Irrigation

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A-4.930 Permit conditioned so that applicant must defer to objector's prior  
T-5.800 right. No adverse effect aside from disobedience to priority rule  
being apparent and that having been thus dealt with, held, no  
adverse effect to other appropriators.

A-16.7516 Applicant is without bona fide intent to appropriate 55.1 acre-feet  
B-5.6979 per year, as 10 acre-feet per year is as much as can be beneficially  
used on the acreage to be irrigated.

L-1.940 Minor changes in 1981 version of statute make explicit what was  
implicit; therefore O.K. to proceed under 1981 version although  
application filed before effective date.

U-12.120 The existence of unappropriated water cannot be measured based on  
the driest years on record as such would sanction the waste of vast  
quantities of water and render the priority system nugatory.

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<b>Final Order Date:</b>	12/30/81 (G W/C)	<b>Applicant:</b>	DeCock
<b>Case #/Type:</b>	19170-s43Q (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	06/20/78	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	1981	<b>Use:</b>	Irrigation/stock

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U-14.1259.00 Where proposed means of diversion will capture almost exclusively  
U-14.1274 high water flows which historically have run to waste and are in  
M-5.110 excess of objectors' needs. Held, unappropriated waters available.  
A-4.930  
W-1.870

J-21.800 Although water in reservoir will inundate county's right-of-way,  
P-18.720 that alone is not sufficient cause to deny permit. Department has no  
O-23.690 authority to determine questions of land ownership and use.

P-5.800 A permit merely licenses a prospective appropriator to complete  
E-24.483 appropriation. Nothing in Montana Water Use Act undermines well  
M-5.110 established precept that actual application of water to beneficial  
use or at least completion of diversion works is prerequisite for  
fully perfected appropriation.

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<b>Final Order Date:</b>	01/14/82 (G W/C)	<b>Applicant:</b>	Bartell
<b>Case #/Type:</b>	23246-s76L (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	06/08/79	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	05/20/82	<b>Use:</b>	Irrigation

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E-22.4848 Objector's assertion that there is no unappropriated water in the  
U-14.1259 source because all the rest of the water besides his, is the tribes,  
held insufficient to prove that the tribe has in fact appropriated  
all the rest of the water. (Tribe did not appear.) [FO]

E-24.4831 Finding (that water right was as claimed) sustained, although  
claimants testified that they needed more than was claimed. [FO]  
  
[Permit granted.]

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<b>Final Order Date:</b>	01/18/82 (G W/C)	<b>Applicant:</b>	Hoyt
<b>Case #/Type:</b>	33983-s41Q (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	06/01/81	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	10/01/81	<b>Use:</b>	Domestic/ Stock/Fish

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**B-5.6979**            The amount of water requested for domestic and stock is not excessive, and will not result in waste.

**B-5.6934**            There is no evidence reflecting that the applicant's purpose of use, fish and wildlife, reasonably requires this quantity of water.  
**B-5.6979**            [Discussion.] Applicant afforded further opportunity to supplement evidence in this regard.

**E-14.9376**           If evidence regarding flood hazard is placed in the record, the  
**P-19.720**           Department may use it to assess environmental effects in light of the substantive directives of MEPA.

**L-1.940**             The adequate means of diversion statutory test merely codifies and  
**M-5.110**           encapsulates the common law notion of appropriation to the effect that the means of diversion must be reasonably effective, *i.e.*, must not result in a waste of the resource. Held, that although this standard may incidentally protect against flood hazard, it does not reach so far as to require that applicant produce evidence that the diversion works can withstand some prescribed level of flood water.

**W-1.870**             Water to be measured at the point of diversion and seepage and evaporative losses incurred thereafter are charged to the appropriation.  
  
                             [Amended proposal issued; permit granted.]

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<b>Final Order Date:</b>	01/23/82 (G W/C)	<b>Applicant:</b>	City of Plentywood
<b>Case #/Type:</b>	32722-g40R (P)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	04/1981	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	09/29/81	<b>Use:</b>	Municipal

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**A-4.9395**            Only probable adverse effect will be to applicant's own wells. Although it is possible that objector's wells may be drawn down beyond their economic ability to withdraw water, that scenario is not likely, and any permit issued in this matter does not accord the permittee the right to infringe on prior rights. Held, § 85-2-311(1)(b) met.

**U-14.1274**           Evidence of low transmissivity suggests that pumping at 1,200 gpm will not be sustainable on a continuous basis. However, the volume requested indicates that applicant will not pump continuously. Moreover, it cannot be said that applicant's pumping will exceed aquifer recharge. Held, § 85-2-311(1)(a), MCA, met.

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<b>Final Order Date:</b>	01/23/82 (G W/C)	<b>Applicant:</b>	Simonson/City of Plentywood
<b>Case #/Type:</b>	33831-g40R (P) 32722-g40R (P)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	02/1981	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	09/29/81	<b>Use:</b>	Irrigation

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**A-4.9395**            Evidence shows that pumping at 500 gpm will have only modest affect on objector's wells, and nothing indicates that modest drawdowns

would lower the water table at any time below the "economic reach" of objectors.

**B-5.6979** Requested 931.5 acre-feet held wasteful.

**E-24.4831** Objector Plentywood has not filed notices of completion on wells with priority dates between 1963 and 1973. Until these are filed, no right to use that water will be recognized.

**U-14.1274** Applicant requests 1,300 gpm up to 931.5 acre-feet per year. However, low transmissivity of aquifer will allow pumping at no more than 500 gpm up to 100 acre-feet per year. Held, § 85-2-311(1)(a), MCA, met only if flow and volume reduced.

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<b>Final Order Date:</b>	01/28/82 (G W/C)	<b>Applicant:</b>	Cadwell
<b>Case #/Type:</b>	27522-s76M (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	06/06/80	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	1981	<b>Use:</b>	Stock

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**A-4.930** No surface water connection between applicant's source and  
**S-15.920** objectors'; therefore, can be no adverse effect that way.

**A-4.9321** Exception that Department must deny permit if any possibility of  
**U-14.1259** interference with other rights should be indicated in the record overruled. If such were the case, there would be no reason to assign priority at all to any permit. One cannot escrow vast portions of the state's water resources merely to be able to conveniently exercise present rights. [FO]

**A-4.9383** Although there may be groundwater connection between applicant's  
**B-21.780** source and objectors', it must remain speculative absent data from  
**U-14.1259** the applicant's actual water use, whether the capture of the waters intended would ever deprive objectors herein of water during their time of need in light of the inherently slow rate of groundwater movement. Held, no adverse effect.

**M-5.110** Means of diversion not adequate because dam is not big enough to hold water for late season use.

**S-20.720** Unappropriated waters are available throughout the time of impound-  
**U-14.120** ment, although not throughout period of use. Held, § 85-2-311(1)(a), MCA, met.

[Permit granted.]

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<b>Final Order Date:</b>	01/28/82 (DIS)	<b>Applicant:</b>	Prevot
<b>Case #/Type:</b>	27726-s76F (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	N/A	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	None	<b>Use:</b>	N/A

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**A-16.7516** Applicant could not attend hearing and advised that he wishes to have same put off until seven months later. Held, applicant may not have **bona fide** intent. Ordered that he submit affidavit justifying delay, or application would be dismissed. [November 19, 1981 Order.]

**S-21.6625** [Applicants could not attend hearing; application for extension denied.]

<b>Final Order Date:</b>	02/09/82 (G W/C)	<b>Applicant:</b>	Bureau of Land Management
<b>Case #/Type:</b>	(a) 27757-s40J (P) (b) 27759-s40J (P) (c) 27775-s40J	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	(a) 06/23/80 (b) 06/21/80 (c) 06/23/80	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	1981	<b>Use:</b>	Wildlife

**A-4.9319**      If applicant captures water which senior appropriators require for their reservoirs, because of the dryness of the soil, the call system will be of little relief.

**S-20.720**

**B-5.6979**      Although 8.9 acre-feet per annum seems excessive for stock water, taking into account seepage and evaporative losses, entitlement to inactive storage to facilitate stock watering, and need for carryover storage to ensure against the occasional dry year, it is not excessive.

**B-5.6979**      To the extent applicant carries water over into the next year, the amount remaining in storage at the time of initiation of diversions for storage in the present water year must be considered part of the present year's appropriative limit.

**S-20.720**

**E-24.4831**      Prior appropriators not entitled to water stored by applicant.

**S-20.720**

**E-24.4879**      Irrigation of land by means of allowing water to spill over the top of a reservoir, utilizing no ditches or dikes, requires an unreasonably large amount of water to deliver a small amount of water for beneficial use. It is an unreasonable means of diversion. Therefore, objector's right will be recognized only to the amount reasonably required for customary irrigation of the acreage claimed.

**M-5.110**

**J-1.800**      Applicant may not divert more than is set forth in permit to make up for evaporation and seepage.

**W-1.870**

**U-14.120**      So long as unappropriated water is available in some years, § 85-2-311(1) (a), MCA, is satisfied.

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<b>Final Order Date:</b>	03/01/82 (G W/C)	<b>Applicant:</b>	Monforton
<b>Case #/Type:</b>	24921-s41E (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	10/24/79	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	06/22/81	<b>Use:</b>	Irrigation

**A-4.930**      Mere fact that other uses on stream interfere with exercise of prior right does not justify the licensing of one more.

**A-4.930**      Diversions made by this applicant will inevitably adversely affect Montana Power Company if they are made in periods when there is no spillage at Cochran Dam, by decreasing hydropower generation and forcing Montana Power to rely on more expensive coal based production.

**U-14.1259**

**A-4.930**      Applicant asserts that because of the "priority system" no adverse effect can result to prior appropriators as any permittee's use remains inferior and subject to claims of prior uses. However, this result fails to explain why objectors have any right of participation at the administrative level. Although it is possible

**U-14.1259**

to recognize adverse effect only in situations where the priority system per se is ineffectual in protecting the water of senior appropriators, **e.g.**, dewatering of aquifer, that is a crabbed reading of adverse effect inconsistent with the broad reach of the statutory language. However, resolution of the issue is not necessary (immaterial) in the present circumstances, in light of the requirement for unappropriated water. [**Dictum** in FO at pp. 3, 5, 11-13.]

**A-4.9321**  
**T-5.800** Although there will be years when no unappropriated water will be available long before August 1, this possibility insufficient to restrict permit further. Prior appropriators cannot play dog in the manger, but can utilize their senior priorities when necessary to obtain water.

**B-5.690**  
**U-14.120** Whether there is sufficient unappropriated water for applicant's intended purposes is immaterial. Department will not make economic decisions for applicant.

**B-5.6979** Applicant has requested more water than it can beneficially use.

**B-21.780**  
**D-21.310** Minor changes in statute make explicit burden of proof which was formerly implicit. Held, no prejudice by proceeding under new statute.

**B-21.780**  
**E-22.480** Substantial credible evidence means that quantum and quality of that will convince a reasonable man of the existence of the ultimate fact. It demands less than a preponderance test, but more than probable cause. [FO]

**E-22.480** Fundamental constitutional right to cross-examine not waived by mere failure to conduct discovery and subpoena the actual declarant.

**E-22.480**  
**E-24.4831**  
**S-21.6621** Purported determination of water right in court case not dispositive where decision voided for lack of subject matter jurisdiction. However, findings made in such case may not be void for all purposes.

**E-24.480** [Digression re history of prior appropriation system of water allocation.]

**E-24.480**  
**L-1.940** Prior appropriator may insist that all water remain in stream so long as a useful quantity will reach him.

**E-24.4831** A prior appropriator's claim embraces all those waters which accrue to his source of supply.

**E-24.4831**  
**L-1.940** Not necessary here to decide whether the **prima facie** statutory derivatives of filing of notices of appropriation survive repeal of sponsoring statute for purposes of determining whether the right exists.

**E-24.4831**  
**S-20.720** Unless Montana Power Company's Cochran Dam is spilling water, the flow of the Missouri (to which the source is tributary) is insufficient to supply Montana Power Company with the full measure of its historic water usage.

**E-24.4831**  
**S-20.720** Spills at Cochran Dam are reliable indicators of when unappropriated water is available in the source, assuming that the Montana Power

**U-14.1259** Company is not precluded from its historic practice of filling, refilling, and otherwise successively fillings its reservoirs. [FO lengthy discussion of one fill rule.]

**J-21.800**  
**U-14.1259** Montana Power Company's exception as to lack of findings regarding its other Missouri River dams overruled as there is no realistic chance in light of the much higher turbine capacities of Cochran Dam that these other structures would have need of water then Cochran Dam is spilling. Moreover, the Department will not encourage jurisdictional disputes with the water courts by making findings as to existing uses which are not necessary for the decision. [FO]

**L-1.940** Hydropower generation not subordinated to agricultural use.

**U-14.120** Unappropriated water almost never available past August 1. Therefore, permit cannot authorize diversion past said date.

**U-14.1259** Just because the proposed appropriation is small does not mean it will not affect Montana Power Company's water right.

**U-14.1259** Applicant asserts that there must always be unappropriated water available for new appropriations as the historic need of a senior appropriator bears no necessary or inevitable relationship to future need given at least the possibility of future abandonment of that right. However, this assertion encourages speculative claims in the water resource, inconsistent with the requirements of a fixed and definite plan. The Department must assume that the past is prologue. Therefore, as the record shows that in all but two years in the last twenty, Montana Power Company has required the entire flow of the Missouri after August 1 (and in the two years, the spills were either insignificant or too late in the irrigation season to make any difference), it must be concluded that there is no unappropriated water in the source after that date. [FO]

[Permit granted with limitations.]

<b>Final Order Date:</b>	03/02/82 (G W/C)	<b>Applicant:</b>	Pettapiece
<b>Case #/Type:</b>	24199-s41QH (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	08/28/79	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	04/30/81	<b>Use:</b>	Irrigation

**B-5.690** Department will not consider whether economic benefits of appropriation will successfully amortize the capital investment in the diversion works in its determination of beneficial use.

**B-5.690**  
**R-5.930** Montana Power Company's exception that it was substantially prejudiced by report leading to finding of beneficial use overruled. Montana Power's rights are fully protected by proposal; therefore, it cannot have been prejudiced. [FO]

**B-5.6979** Amount of water applied for held excessive for demonstrated use.

**E-22.480** Report admitted into record (although author not present for cross-examination) as "business record" exception to hearsay prohibition.

**E-22.480** Copies of notices of appropriation comply with best evidence rule when other parties given opportunity to compare them with originals.

**E-22.480** Apparently **prima facie** effect of notices of appropriation assumed to have survived repeal of statute.

**E-24.4879** Allowing objectors to insulate available waters in the source based on the assertion that these waters are not sufficient for applicant's purposes in effect allows the objectors the privilege of commanding substantial quantities of water merely to extract a small portion thereof. An appropriator's right does not carry that far.

**R-5.930** Findings as to acreage to be irrigated in error. [FO]

**R-5.930** August 10th termination of any diversion by applicant  
**U-14.1259** based on unreasonably optimistic estimate of water availability. Permit modified to require cessation as of August 1. [FO]

**T-5.800** There is unappropriated water when Cochran Dam is spilling  
**U-14.1259** Permit may issue if diversion limited to such periods.

**U-14.1259** Objector Montana Power Company's requirements yield no unappropriated water in source after the middle of July in most years. [Discussion of Montana Power's rights.]

**U-14.1259** Cannot allow even a small appropriation where all water of stream appropriated, even if prior appropriation is for downstream hydropower.

[Permit issued with restriction.]

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<b>Final Order Date:</b>	03/05/82 (G W/C)	<b>Applicant:</b>	I X Ranch
<b>Case #/Type:</b>	26858-s40H (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	03/10/80	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	1981	<b>Use:</b>	Irrigation

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**A-4.9348.00** The existence of an established water right does not give that  
**L-1.940** appropriator a right to increase his demand upon the source without making a new appropriation. [FO]

**A-16.7576** Lapse of four months between filing of application and publication of notice does not render notice invalid.

**A-16.7576** Whether or not objector should have been served with notice  
**D-21.310** individually, the appearance of objector obviates the necessity to make such determination.

**B-5.6979** Evidence as to applicant's existing rights irrelevant in proceeding  
**E-22.480** for permit, except as relates to beneficial use of amount of water  
**E-24.480** applied for.

**E-24.4831** Nothing in the record indicates that objector Bureau of Reclamation's uses of water are beyond the purview of congressionally delegated authority.

**E-24.4831** Defeasance of Warren contracts (for surplus stored water) dependent  
**U-14.1259** only on need within project boundaries, not on the needs in the entire basin.

**E-24.4834** Do not have to decide whether Bureau of Reclamation can appropriate for fish and wildlife purposes.

**T-5.800** Conditioning permit so that water cannot be stored except in April  
**U-14.1259** and May and then only if water spilling at Vandalia Dam untenable because of short high volume nature of spills. However, permit could

be conditioned so that applicant may store, but must release stored water if Vandalia fails to spill subsequent to applicant's storage.

**U-14.1259** When Vandalia Dam spills no water, there is no unappropriated water in the Milk River system.

**U-14.1259** Fact that applicant's diversion of 500 acre-feet would be immeasurable at Vandalia Dam does not make interference trifling.

**U-14.1259** Department report that shows Vandalia Dam spills outside April-May does not mean that unappropriated water exists in source outside April-May period because report fails to account for impoundment by other facilities. However, proposal fails to take into account fact that such analysis as was used (showing that water is available for applicant when Vandalia Dam spills in April-May) is valid anytime outside of the irrigation season. [FO]

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<b>Final Order Date:</b>	03/22/82 (G W/C)	<b>Applicant:</b>	Wilson/Holst
<b>Case #/Type:</b>	34145-76LJ (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	04/29/81	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	1982	<b>Use:</b>	Fish

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**A-4.930** Concern here is that appropriation will increase drainage problems. However, evidence indicates this probably not the case, and permit proceedings merely contemplate a first look. Permit issuance does not deprive them of their rights.

**A-4.930** Department has no authority to assess damages for future abridgments of senior rights. [FO]

**A-16.7516** Applicants have a **bona fide** intent to appropriate water pursuant to fixed and definite plan. Although pond will not be stocked with fish for several years, hiatus necessary to assure pit will remain stable.

**B-5.6934** While a situation may exist where persons could require 803.5 acre-feet per year for a fishery in a 2.5 acre-foot impoundment, by the evidence presented here, the Department concludes that only 5 acre-feet per year are necessary. Fish portion of permit reduced accordingly. [FO]

**B-5.6979** Amount of water applied for held excessive for irrigation in view of soil moisture holding capacity.

**L-1.940** Flooding concerns per se are not within the purview of the Water Use Act. Thus, unless drainage problems interfere with the right of another appropriator to divert and beneficially use water, these difficulties are not an infringement or an adverse effect to the rights of a prior appropriator. [FO]

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<b>Final Order Date:</b>	04/20/82 (G W/C)	<b>Applicant:</b>	Kyler Ranch
<b>Amended Final Order:</b>	05/14/82		
<b>Case #/Type:</b>	21956-g41A (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	02/27/79	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	1982	<b>Use:</b>	Irrigation

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**A-4.9383** Applicant's pumping will not induce more recharge from Boulder River. Therefore, surface user Montana Power will not be adversely affected hereby.



**A-4.9395** Evidence shows there will be no adverse effect to others by well interference.

**A-16.7576**  
**D-21.310** Description of proposed points of diversion different points of diversion different than public notice. Held, difference insignificant; no prejudice.

**B-5.6979** Limited water holding capacity of soil justifies seemingly extravagant volume requested.

**D-21.310**  
**E-22.480** Statute of 1981 may be used without prejudicing applicant who applied before effective date.

**P-5.8021**  
**U-14.1274** Although it is difficult to tell whether applicant's proposed well will produce 2,000 gpm, permit may issue for same and volume requested as volume may be produced at a lower flow rate, and flow rate can be reduced at verification.

**U-14.1259** Such waters as applicant will pump are surplus to needs of other ground water appropriators, as amounts withdrawn will be compensated for from Boulder River recharge to aquifer.

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<b>Final Order Date:</b>	04/29/82 (G W/C)	<b>Applicant:</b>	Fairhurst
<b>Case #/Type:</b>	17076-s41F (P)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	01/23/78	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	1982	<b>Use:</b>	Irrigation

**A-4.930**  
**U-14.1259** No adverse effect to source users because these tail waters have not historically returned to the source on the surface, and because it is unreasonable to assume that tail waters percolating into the ground move at any degree of dispatch to any surface stream.

**S-15.920**  
**W-1.870** Waste (tail) water is appropriable.

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<b>Final Order Date:</b>	05/06/82 (G W/C)	<b>Applicant:</b>	Krutzfeldt
<b>Case #/Type:</b>	(a) 24489-s42J (P) (b) 26009-s42J (P) (c) 26010-s42J (P) (d) 26011-s42J (P) (e) 26012-s42J (P) (f) 26013-s42J (P) (g) 26016-s42J (P) (h) 26020-s42J (P) (i) 26021-s42J (P)	<b>Regional Office:</b>	Miles City
<b>Application Date:</b>	(a) 09/18/79 (b) thru (i) 11/06/79	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	1982	<b>Use:</b>	Irrigation

**A-4.930** Reservoir on stream. Applicant may not divert more from stream than is released from storage.

**A-4.930**  
**D-21.310** Any delay (in processing application) that merely preserves the status quo on a stream cannot adversely affect objectors.

**A-4.9321** The test of adverse effect to prior appropriators within the guise of the permitting process is not the possibility of infringement or even the certainty of such infringement should applicant disregard the priority system.

**A-16.750**                      Applicant may not fill and refill his series of reservoirs if he  
**S-20.720**                      would exceed the annual volume applied for.

**B-5.6979**                      Carryover storage must be deducted from next year's volume approp-  
**S-20.720**                      riated, for to authorize the use of the carryover in addition to the  
full annual volume would countenance diversion of water in excess of  
the appropriator's stated needs. [Discussion in FO]

**B-21.780**                      No objector is prejudiced by imposing on applicant the lesser  
**D-21.310**                      standard of proof as specified in the 1981 version of the statute  
for large applications.

**D-21.310**                      Changes in 1981 statute merely express what was implicit. Therefore,  
no prejudice by testing applications against the 1981 version.

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<b>Final Order Date:</b>	06/07/82 (G W/C)	<b>Applicant:</b>	Walton
<b>Case #/Type:</b>	30542 (C)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	1981	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	1982	<b>Use:</b>	Irrigation

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**A-4.9348.20**                      Historic use will not be expanded by change in place of use and  
point of diversion.

**T-5.800**                      Applicants must install gated inlet structure on dike spreader  
system so juniors can get water when applicant does not need.

[Change authorized.]

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<b>Final Order Date:</b>	06/08/82 (D)	<b>Applicant:</b>	U.S. Department of Interior
<b>Case #/Type:</b>	(a) 26419-s40J (P) (b) 26420-s40J (P) (c) 26421-s40J (P) (d) 26422-s40J (P) (e) 26423-s40J (P) (f) 26424-s40J (P) (g) 26425-s40J (P) (h) 26426-s40J (P) (i) 26427-s40J (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	01/21/80 (All)	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	1982	<b>Use:</b>	Wildlife

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**B-5.690**                      Fact that the proposed use may be more productive than objector's  
**E-22.480**                      uses is irrelevant in permit considerations.

**E-24.4831**                      Objector's expanded use on decreed stream may not be valid, right  
as, under the terms of R.C.M. 89-829, post-adjudication  
appropriations required court approval.

**E-24.4831**                      Objector is entitled to carryover storage under decree. Therefore,  
**S-20.720**                      that water not available to applicant.

**E-24.4879**                      Appropriation by natural flooding may in certain cases be legitimate  
**M-5.110**                      if not wasteful and requiring an unreasonable amount of water for  
delivery.

**E-24.4879**                      Long and leaky ditches not necessarily unreasonable.  
**M-5.110**

**S-20.720**                      Waters applicant wishes to use are tributary to McLaren Reservoir

**U-14.1259** which spills only on rare occasion; the waters stored therein are used by downstream appropriators. Held, no unappropriated water available.

**U-14.1259** Although the proposed diversion may be small in comparison to downstream uses, this does not sanction the interference.

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<b>Final Order Date:</b>	06/09/82 (D)	<b>Applicant:</b>	Denkinger
<b>Case #/Type:</b>	20771-s76N (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	N/A	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	05/12/82	<b>Use:</b>	Irrigation

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**A-16.7516** [Application dismissed; applicant had no intention of proceeding with the project.]

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<b>Final Order Date:</b>	07/19/82 (G W/C)	<b>Applicant:</b>	Loomis/Edenfield
<b>Case #/Type:</b>	28224-s41I (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	04/25/80	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	12/07/81	<b>Use:</b>	Mining

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**A-4.930** "Opening the floodgates" argument that future similar appropriations will threaten prior appropriator, not relevant. Future appropriators must also get permit.

**A-4.9379** Disruption of timing of flows in Confederate Creek caused by delay in return flow from settling ponds via ground percolation may adversely affect objectors. Applicant did not prove otherwise. Held, § 85-2-311(1)(b), MCA, not met.

**A-4.9394**  
**T-5.800** Piping return flow directly back to Confederate Creek does not appear to involve any overwhelming water quality problems, and would solve problem of delayed return flow.

**A-16.750**  
**D-21.310**  
**E-22.480** New language added to § 85-2-311, MCA, in 1981 merely makes explicit what was formerly implicit. Accordingly, no prejudice to applicant by proceeding under new statute, although application filed before it was passed.

**A-16.7516** Volume requested in application reduced because application has no fixed and definite plan for use of part of the water; he was merely providing for hope of increased mine production at some future point.

**A-24.980** Applicant's present need for water may be tested without reference to its claim of existing right because "existing right" was established on adjudicated stream without complying with R.C.M. 89-829, and therefore probably does not exist.

**U-14.120** Use is nonconsumptive, and water has been shown physically available; held, § 85-2-311(1)(a), MCA, met.

**U-14.1259.70** Minimal evaporation loss does not defeat nonconsumptivity of use.  
  
[Proposal to deny.] [Permit granted with condition that return flow must be piped directly back to creek.]

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<b>Final Order Date:</b>	07/26/82 (D)	<b>Applicant:</b>	Haynes
<b>Case #/Type:</b>	29427 (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	03/25/80	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	05/11/82	<b>Use:</b>	Domestic/Stock

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U-14.120 Unappropriated water not available throughout period of use and applicant cannot reasonably exercise his water right unless water is available throughout entire period of use. Section 85-2-311(1) (a), MCA, not met.

[Permit denied.]

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<b>Final Order Date:</b>	08/13/82 (G W/C)	<b>Applicant:</b>	Powers
<b>Case #/Type:</b>	38494 (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	11/10/81	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	7/13/82	<b>Use:</b>	Irrigation

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E-24.4831 Objector's failure to comply with 1921 statute governing appropriation of water on decreed stream probably invalidates most of his claimed water right.

E-24.4831 Decree for water given by district court adjudicating right with a  
J-21.800 priority date of 1980 invalid and irrelevant to these proceedings. Department has exclusive original jurisdiction over acquiring water rights since 1973.

U-14.1259 Regardless of status of objector's claim, evidence shows objectors do not always use the water to the full extent of their claims. Held, that there will be some years in which the amount requested herein will be available for applicant's use.

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<b>Final Order Date:</b>	08/16/82 (G)	<b>Applicant:</b>	Engel
<b>Case #/Type:</b>	29428-s76N (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	05/02/80	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	05/12/82	<b>Use:</b>	Domestic/Stock/ Irrigation

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A-4.9383 Periodic low flows in objector's springs related to precipitation patterns, not applicant's diversion from other springs. Held, no adverse effect.

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<b>Final Order Date:</b>	11/09/82 (G W/C)	<b>Applicant:</b>	Klein
<b>Case #/Type:</b>	29795-s76G, (P) 31306-s76G, and 31307-s76G	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	10/08/80	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	4/8/82	<b>Use:</b>	Mining

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A-4.9325 Applicant intends to extract ore directly from stream source, which  
J-21.800 in turn will affect the capacity of the source of supply to pass  
S-15.920 water in a given volume as surface flow. Held, this potential effect immaterial in present case as the parameters of the material issues are defined by the taking and use of the water resource.

A-4.9379 Because applicant intends to use settling ponds which delay return, call system may not work adequately. Therefore, only must condition to prohibit applicant from diverting unless water is spilling at objector's diversion.

**A-16.7516** Applicants' plans to divert water from one stream to another are so undefined and ill-formed as to be speculative.

**A-16.7567** Although amendments contained enlargement of time and place of use, because priority is junior to all on source, no prejudice can accrue by keeping original filing date as priority. However, examiner is not comfortable with such "bootstrapping" by amendment.

**A-16.7576** All amendments to applications were reflected in public notice. No prejudice to public or objectors by failure to actually alter original applications.

**D-21.310** No trans-basin diversion could be allowed hereunder because of inadequate notice that applicant intended same.

**E-24.9879** Objector requires a significant head of water merely to push the waters required for actual beneficial use to their place of use, and the evidence does not show that this is either unreasonable or wasteful. Therefore, objector is entitled to the full head.

**E-24.9879** Objectors' uses do not have to be most efficient, only reasonable.  
[FO]

**T-5.800**  
**U-14.120** Evidence shows unappropriated water never or rarely available July 15 - August 15. Held, to meet 85-2-311(1)(a) criteria, said period must be cut out of period of use.  
  
[After FO, motion for rehearing filed.]

**R-5.9379** Motion for rehearing denied on basis that Attorney General's Model Rules allow but do not substantively grant a right to administrative rehearing. [Amended FO.]

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<b>Final Order Date:</b>	11/09/82 (DIS)	<b>Applicant:</b>	Kelly
<b>Case #/Type:</b>	30622 (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	N/A	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	8/18/82	<b>Use:</b>	

**A-16.7516** No appropriative intent where applicants do not intend to divert more than they have claimed in adjudication.  
  
[Application dismissed.]

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<b>Final Order Date:</b>	11/10/82 (G W/C)	<b>Applicant:</b>	Erickson
<b>Case #/Type:</b>	32095-s76LJ (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	08/01/80	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	05/18/82	<b>Use:</b>	Domestic

**U-14.1259** Base flow of Walker Creek is two times the filed claims thereon. Held, unappropriated water exists in the source.

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<b>Final Order Date:</b>	11/19/82 (G W/C)	<b>Applicant:</b>	Bender
<b>Case #/Type:</b>	38719-s43Q (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	09/14/81	<b>Examiner:</b>	Dockins
<b>Hearing Date:</b>	08/24/81	<b>Use:</b>	Irrigation

**A-4.930** Can be no adverse effect to upstream senior. Downstream senior did not appear at the hearing; however, obtaining water not apparently his concern.

**A-4.930**                      Determination of whether stream bed alterations made by applicant  
**E-22.480**                      interfere with objector's water rights is separate and distinct from  
the issue of whether the appropriation will adversely affect  
objector's rights. It is not relevant.

**E-22.480**                      Whether subdivision upstream illegally diverting held irrelevant.

**E-22.480**                      Whether or not applicants could make use of water source other than  
**S-15.920**                      the one for which they are applying irrelevant.

**U-14.120**                      Although flow of Blue Creek is erratic, evidence shows that there  
will be some years that the amount requested by applicant will be  
(physically) available. Held,  
§ 85-2-311(1)(a), MCA, met.

[Permit granted.]

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<b>Final Order Date:</b>	03/24/83 (D)	<b>Applicant:</b>	Western Water Co.
<b>Case #/Type:</b>	39786-g76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	10/19/81	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	9/28/82	<b>Use:</b>	Domestic

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**A-4.930**                      Evidence of adverse effect herein outweighs any act of certification  
**E-22.480**                      from the Department of Health.

**A-4.9395**                      Hydraulic characteristics of aquifer make it probable that  
applicant's well will create a cone of depression sufficient to draw  
down objector's wells to the point they cannot be operated. Held,  
this is adverse effect.

**A-4.9395**                      Aquifer is at or near its sustained yield, that is, additional  
**E-24.4879**                      consumption may result in "mining" of the aquifer. Although mining  
**U-14.120**                      of water is not a practice inevitably condemned where the amounts of  
water tied up by relatively shallow wells is great and the need for  
water in the overlying basin is critical, applicant has not  
demonstrated that this is the case. Held, objector's means of  
diversion are reasonable as against the applicant.

**B-5.6979**                      Whether applicant has requested enough water held immaterial in this  
case.

**B-21.780**                      Burden of production of evidence of an existing right is on  
objector.

**R-5.930**                      Broad assertion that proposal is "wrong" is meaningless and  
insufficient to contest proposal. [FO]

[Permit denied.]

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<b>Final Order Date:</b>	03/28/83 (D)	<b>Applicant:</b>	East Bench Grain & Machinery, Inc.
<b>Case #/Type:</b>	25170-g41B (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	12/08/79	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	1982	<b>Use:</b>	Irrigation

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**A-4.930**                      Applicant's arguments that there is a lack of evidence supporting a  
**B-21.780**                      finding of adverse effect are unpersuasive. The evidence must  
support a finding of no adverse effect, and it is applicant's burden  
to provide it. If he does not, the permit cannot issue, whether  
adverse effect is affirmatively found, or if the evidence as to  
adverse effect is nonexistent or inconclusive. [FO]

**A-4.930**                    The Department cannot "find" unappropriated water and no adverse  
**T-5.800**                    effect merely by conditioning the permit subject to existence of  
**U-14.120**                   same. [FO]

**A-4.9395**                   To show no effect on objector is possible, applicant must show more  
than a mere lack of surface connection. Here, subsurface connection  
is apparent. [FO]

**A-4.9395**                   Evidence shows that the proposed appropriation will draw down  
**E-24.4879**                   objectors' well to a point where it is inoperable. Although  
objectors' well is somewhat shallow in terms of present day  
irrigation wells in the area, the objector is not entangling the  
greater portion of the aquifer against all subsequent uses merely to  
extract the top portions thereof. Rather, it is the too close  
spacing of applicant's well to objectors' which is the culprit.  
Therefore, it is concluded that unless applicant defrays the cost of  
the necessary deepening of objectors' well, there will be adverse  
effect to objectors.

**B-5.6979**                   Diversion of 415 acre-feet per year in this instance excessive.

**M-5.110**                   There is water available in the source; however, applicant's  
diversion location may require a well so deep to obtain these waters  
as to be prohibitively expensive. Cannot tell until drilled. (But  
means of diversion held adequate.)

**U-14.120**                   An applicant makes a **prima facie** showing of unappropriated water and  
no adverse effect where the evidence indicates that water is  
physically available and proposed use can be properly regulated in  
times of shortage in deference to senior demand. [FO]

[Applicant was allowed additional time to supply information  
regarding adverse effect.]

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<b>Final Order Date:</b>	04/14/83 (G W/C)	<b>Applicant:</b>	Cox
<b>Case #/Type:</b>	42358-s43D (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	01/12/82	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	01/18/83	<b>Use:</b>	Irrigation

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**U-14.120**                   In some years there are unappropriated waters in the source of  
supply throughout the period of appropriation. Held, \$85-2-311  
(1)(a)(iii), MCA, met.

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<b>Final Order Date:</b>	05/25/83 (D)	<b>Applicant:</b>	Diamond City Mining Co.
<b>Case #/Type:</b>	29912 (P) 29913 (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	10/16/80	<b>Examiner:</b>	Roberts
<b>Hearing Date:</b>	01/20/83	<b>Use:</b>	Mining

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**A-16.7516**                   Applicant is speculating as to how much and when water will be  
available. Therefore, no **bona fide** intent.

**E-22.480**                   Examiner relied on findings made in **Loomis** (28224), that there was  
no unappropriated water in Confederate Creek after notifying parties  
at prehearing that he would do so.

**J-21.800**                   Statement in **Rankin v. Mathews** that water rights therein decreed not  
for mining, does not deprive Department of original jurisdiction to

grant mining permit, nor does it compel Department to seek district court approval of mining permit before granting.

**U-14.120** Although water flows from source into Canyon Ferry Reservoir, this insufficient to show unappropriated water because evidence rebutted by testimony of objector who lives near confluence that such water is in fact rising groundwater.

**U-14.120** Under § 85-2-311, MCA, an applicant makes a **prima facie** showing of unappropriated water and a lack of adverse effect to prior appropriators when the evidence indicates that (a) there is water physically available for the appropriator's use in the quantity sought; and (b) the proposed use can be properly regulated in times of shortage in deference to senior demand. However, when an objector makes proof of existing water rights, applicant must then demonstrate that his water use will not for all practical purposes capture water otherwise required by established uses.

**U-12.1459.70** Difference between consumptive and nonconsumptive use defined.

**U-12.1459.70** Fact that applicant must divert up to 81,340 gallons of "make-up" water to replenish water consumed during mining process, coupled with fact of time delays in returning water to source, demonstrates use is not nonconsumptive.  
[Permit denied.]

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<b>Final Order Date:</b>	05/25/83 (G W/C)	<b>Applicant:</b>	Babcock
<b>Case #/Type:</b>	42136-s76M (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	02/09/82	<b>Examiner:</b>	Roberts
<b>Hearing Date:</b>	03/09/83	<b>Use:</b>	Domestic

**B-21.780** The parties stipulated to the existence of the statutory criteria. No evidence was presented. Held, criteria met. [Permit granted.]

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<b>Final Order Date:</b>	05/25/83 (G W/C)	<b>Applicant:</b>	Ahearn/Morris
<b>Case #/Type:</b>	45875-s76M (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	04/15/82	<b>Examiner:</b>	Roberts
<b>Hearing Date:</b>	03/09/83	<b>Use:</b>	Domestic/Irrigation

**B-21.780** Parties stipulated to existence of all criteria. Held, criteria met. [Permit granted.]

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<b>Final Order Date:</b>	05/27/83 (G)	<b>Applicant:</b>	Morse
<b>Case #/Type:</b>	28975-c43C (C)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	09/03/80	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	01/19/83	<b>Use:</b>	Irrigation

**A-4.9348.20** There was no showing by any of the objectors that the proposed change in point of diversion would adversely affect any of their water rights. Section 85-2-402, MCA, met.

**J-21.800** Once final order issued, the Department no longer retains jurisdiction to rehear case or substantively amend final order.  
**R-5.9397** Applicant's motion for clarification is really a motion for reconsideration which must be denied. [FO]

[Change authorized.]



<b>Final Order Date:</b>	05/27/83 (G W/C)	<b>Applicant:</b>	Morse
<b>Case #/Type:</b>	45541-s43C (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	04/27/82	<b>Examiner:</b>	Roberts
<b>Hearing Date:</b>	01/19/83	<b>Use:</b>	Irrigation

**B-5.6979** Permit granted for less than requested as applicant already had water appurtenant to land, and that plus the requested amount excessive. [Permit granted.]

<b>Final Order Date:</b>	(Est) June 83 (G W/C)	<b>Applicant:</b>	Lee
<b>Case #/Type:</b>	31585-s410, (P) 36164-g410, (P) and 35862-g410 (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	02/05/81 09/29/81 09/14/81	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	2/23/82 & 2/28/83	<b>Use:</b>	Irrigation

**J-21.800** Not all terms of agreement incorporated in order; only those elements of agreement responsive to the issues framed by § 85-2-311, MCA, incorporated.

**S-15.920** The waters which will be intercepted by this well if left undiverted would affect the flow of Ralston Gap. Such waters are therefore not groundwater within the meaning of the Water Use Act.

[Case settled by parties; withdrawal of objections pursuant to agreement.]

<b>Final Order Date:</b>	09/16/83 (D)	<b>Applicant:</b>	Halverson
<b>Case #/Type:</b>	46920-s76F (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	06/11/82	<b>Examiner:</b>	Roberts
<b>Hearing Date:</b>	03/11/83	<b>Use:</b>	Mining

**A-4.9348.20** Placer settling pond to be used. Held, evidence provided insufficient to prove that the use is truly nonconsumptive as settling pond could significantly delay return of water to source.

**A-16.7516**  
**B-5.690** Where applicant admitted she will never use the amount of water requested, held she is speculating in the amount of water needed. Not a sufficient basis for granting permit.

**A-16.7516**  
**M-5.110** An applicant is not required to prove that he owns the property over which water is to be conveyed.

**A-16.7516**  
**M-5.110** Existence of injunction preventing applicant from working mining claims (and thus diverting water therefor) does not preclude Department from issuing permit.

<b>Final Order Date:</b>	09/16/83 (G W/C)	<b>Applicant:</b>	MacDonald
<b>Case #/Type:</b>	49371-g43Q (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	07/01/82	<b>Examiner:</b>	Roberts
<b>Hearing Date:</b>	06/06/83	<b>Use:</b>	Irrigation

**A-4.9395**  
**U-14.120** Uncontradicted expert testimony showing that the proposed appropriation caused no significant drawdown in either applicant's well or any of the surrounding objector's wells held sufficient to prove § 85-2-311(1)(a) and (b).

R-5.930 Conclutory, vague, and argumentative language in exception held insufficient to warrant consideration.

[Permit granted.]

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Final Order Date:	10/03/83 (G W/C)	Applicant:	Reiter/Grunstead
Case #/Type:	43024-s43D (P)	Regional Office:	Billings
Application Date:	02/19/82	Examiner:	Roberts
Hearing Date:	04/21/83	Use:	Irrigation

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A-4.930 Objectors failed to present evidence of adverse effect to their  
B-21.780 water rights in an orderly and understandable manner, or to bring out salient points of law or fact. Their case simply was not persuasive or sufficient to persuade the examiner that the permit should be denied.

J-21.800 Permit right does not include ditch rights. These must be obtained  
M-5.1129 separately. Failure to prosecute the diversion works is grounds for  
P-5.8021 revocation. [FO]

R-5.930 New evidence not allowed in exceptions to proposal. [FO]

U-14.120 Determination of whether surplus water exists for appropriation cannot be made solely by examining the driest years of the water commissioner's records. Prior appropriators cannot paralyze the development of unused portions of the stream system merely to protect against potential interferences in dry years.

U-14.120 There are periods of time when water is physically available for proposed use, and the proposed use can be properly regulated in times of shortage in deference to senior demand. Thus, applicants have made a **prima facie** showing of "unappropriated water" and "no adverse effect."

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Final Order Date:	12/16/83 (G W/C)	Applicant:	Kruse
Case #/Type:	39577-s41E (P)	Regional Office:	Helena
Application Date:	12/21/81	Examiner:	Williams
Hearing Date:	9/23/82	Use:	Mining

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A-4.9325 The proposed use (placer mining) is nonconsumptive; thus, the only effect it can have on downstream users is disruption of pattern of flow.

A-4.9373 Because downstream users (including Montana Power Co.) are below a glacial moraine which restricts and regulates flow, whether diverted water returns to the source by percolating through the ground will not affect pattern of flow to them. Held, no adverse effect by disruption of pattern of flow.

E-24.4831 Montana Power Co. objection should be stricken (**see In re Don Brown**)  
O-2.490 however, Montana Power will not be adversely affected regardless of actual extent of their right, as use is nonconsumptive. **See** below.

U-14.120 Unappropriated water available at least in some years. Held, § 85-2-311(1)(a), MCA, met.

[Permit granted.]

<b>Final Order Date:</b>	12/19/83 (D)	<b>Applicant:</b>	Pitsch
<b>Case #/Type:</b>	9357-s40A (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	09/01/76	<b>Examiner:</b>	Throm
<b>Hearing Date:</b>	11/07/77	<b>Use:</b>	Irrigation

**A-4.9394** Increase in water salinity making same undrinkable by stock is an adverse effect to stock water right. [FO]

**B-21.780** Although application did not specify flow rate, clear and convincing  
**E-22.480** was correct evidentiary standard. [FO]  
**L-1.790**

**E-22.480** Admission of evidence for a limited purpose is well accepted, even when the formal rules of evidence apply. [FO]

**J-21.800** Failure of Department to take action within time prescribed does not  
**S-21.660** yield automatic grant of permit. [FO]

**O-2.490** Determination of whether objections are valid is a determination expressly within the discretion of the Department. [FO]

**R-5.930** The fact that the hearing examiner, one William Throm, may have somewhat inarticulately botched the explanation of the law, does not excuse a represented party from not knowing the law. [FO]

**R-5.930** Although the specified proposed "Findings of Fact" in the proposal are phrased to reflect their testimonial nature, this idiotic phraseology does not impair their function as proposed findings. [FO]

<b>Final Order Date:</b>	03/20/84 (G W/C)	<b>Applicant:</b>	Moldenhauer
<b>Case #/Type:</b>	G-05081-41I (C)	<b>Regional Office:</b>	Helena
	G-05083-41I (C)		
<b>Application Date:</b>	09/19/82	<b>Examiner:</b>	Roberts
<b>Hearing Date:</b>	04/29/83	<b>Use:</b>	Irrigation

**A-4.930** Objector made no showing that the proposed change will result in  
**B-21.780** adverse effect to its rights, but argues that the adverse effect is to its claim of ownership and that applicant is causing harm by using the water which both parties claim. This insufficient. [FO]

**A-4.930** When objector claims same water rights as applicant proposes to  
**E-24.480** change, a determination of adverse effect cannot be made until the ownership issue is resolved.

**A-4.930** Department rejects examiner's conclusion that "without knowing the  
**E-24.480** true owner of the water rights proposed to be changed, no meaningful determination of adverse effect can be made". Questions of whether other existing uses of water will be affected can be answered as matters of fact without making a final determination as to whether applicant has title to water right. [FO]

**A-4.930** It is not a correct statement of the law to say that the Department  
**J-21.800** must issue a permit where there has been no finding made re adverse effect. [FO Memo.]

**A-4.9348.20** The proposed change in point of diversion will not adversely affect the rights of other persons. [FO]

A-4.9379  
B-21.780 Objector did not present sufficient evidence to support a determination of adverse effect from loss of return flow. [FO]

B-5.690  
D-21.310  
J-21.800 The Department rejects the argument that a denial of a change authorization denies applicants the use of their water right. [FO Memo.]

B-21.780 Objectors have burden of proof to prove injury in change proceeding. [Caution - This rule has been superseded.]

E-24.480 Applicant made a sufficient showing of ownership to justify the Department proceeding to a determination of adverse effect to other persons. [FO]

E-24.480  
J-21.800 Department has no statutory authority to determine ownership of contested water rights.

E-24.4820  
J-21.800 Approval of the application for change is in no way a grant of a 311 permit. If applicant is ultimately determined by the water court not to have a water right, applicant would obtain no vested right to use water by his exercise of the changed right in the interim. [FO Memo.]

J-21.800 A decision on ownership made for the purposes of allowing the Department to proceed with a determination on whether a proposed change in water use will adversely affect other persons does not reach the **res judicata** level of finality as is obtained in the adjudication. Therefore, the Department does not usurp water court jurisdiction in making such determinations. Further, the Department does have the implied power to make initial determinations of water rights in order that it may effectively discharge its duties. [FO]

J-21.800 Department has no authority to deny permit for misconduct of applicant pursuant to § 85-2-402(5), MCA. [FO Memo.]

J-21.800  
S-21.660 The statutory time periods are directory rather than jurisdictional, and failure to act within them does not trigger a mandatory duty either to grant or deny. [FO Memo.]

O-2.490 An objector's failure to request a hearing is not fatal to his objection. [FO Memo.]

R-5.930 [FO - Department adopted additional findings of fact to support final order different than proposal.]

R-5.930 Finding of fact, though wholly irrelevant to proceeding, cannot be rejected or modified at final order unless clearly erroneous. [FO Memo.]

S-21.6621 **Res judicata** is a judicial doctrine, and a party to an administrative proceeding is not entitled as of right to its protections. However, the equitable concerns that underlie the doctrine may dictate that the branch of **res judicata** known as collateral estoppel be applied. [FO Memo.]

S-21.6621 Because of the inherent lack of clarity in the 1975 order, and because that order was in part the result of a stipulated settlement, the order lacks **res judicata** force. [FO Memo.]

[Authorization granted.]

<b>Final Order Date:</b>	04/06/84 (G)	<b>Applicant:</b>	Smith
<b>Case #/Type:</b>	G18583-43Q (C)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	06/16/81	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	01/12/84	<b>Use:</b>	Storage/Irrigation

**S-20.720** [Application to change certificate of groundwater right, to wit: change in point of diversion and addition of 1,000 gallons of storage. Approved.]

<b>Final Order Date:</b>	04/06/84 (D)	<b>Applicant:</b>	Landon
<b>Case #/Type:</b>	49483-s43Q (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	11/23/82	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	03/05/84	<b>Use:</b>	Irrigation

**A-16.7567** Notice of groundwater completion cannot be relied upon to gain an earlier priority date than that of application filing for surface water flow derived from that source.

**M-5.1129** Lack of an easement is not a basis for denying a permit.

**S-15.920** The waters of a developed spring, once flowing on the surface of the ground are considered surface waters.

**U-14.120** Under facts presented, held no unappropriated water exists in unnamed tributary. [Permit denied.]

<b>Final Order Date:</b>	04/16/84 (G W/C)	<b>Applicant:</b>	Peterson
<b>Case #/Type:</b>	40064-g76G (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	02/01/82	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	02/15/84	<b>Use:</b>	Irrigation

**B-5.6979** Where 62.4 acre-feet are needed to efficiently irrigate acreage, and applicant already has a claim for 40 acre-feet, permit can issue for only 22.4 acre-feet. [Permit granted in part.]

<b>Final Order Date:</b>	04/23/84 (G W/C)	<b>Applicant:</b>	Kunneman
<b>Case #/Type:</b>	W138008-43A (C)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	04/30/82	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	09/29/83	<b>Use:</b>	Irrigation

**E-22.480** Administrative notice of a Supreme Court decision is improper, as administrative notice is a rule of evidence which is not applicable to the substantive law governing the case.

**E-22.480** If an "objection" to a question is made, but party then argues the substance of the issue as part of its "objection", an objection was not made; rather evidence or argument is being given in anticipation of the response to the question.

**E-22.480**  
**E-24.480**  
**J-21.800** Evidence of pre-1973 use of a water right on land other than that described in a decree is not a collateral attack upon the decree, nor is Department recognition of the altered place of use a modification of such decree, as appropriator had a right to alter the place of use at will before 1973 subject only to district court modification to prevent injury.

**E-24.480** A water right is not permanently appurtenant to the land to which it was decreed; before 1973 it could be moved at will subject only to

district court modification upon proof of adverse effect to other appropriators.

J-21.800

P-18.720

The Department does not have jurisdiction to deny a change application based on adverse effect to property other than water rights. [Reasoning: Proposal for Decision, Preliminary Matters; Final Order.] However, a Department change authorization does not insulate applicant from property damage claims resulting from such change made presented in a court of competent jurisdiction.

**Final Order Date:** 04/24/84 (G W/C)  
**Case #/Type:** 10841-s41G (P)  
**Application Date:** 12/29/76  
**Hearing Date:** 1982

**Applicant:** Woods  
**Regional Office:** Helena  
**Examiner:** Williams  
**Use:** Irrigation

A-4.930

U-14.1259

The uses of the waters applied for herein will not adversely effect the rights of prior appropriators as applicant's diversion will not inevitably or necessarily capture waters otherwise required for downstream demand, and because in times of scarcity, applicant's use is junior to such demand.

B-21.780

[Discussion with citations on allocation of the burden of proof.]

B-24.4879

Bureau of Reclamation's means of diversion of water at Canyon Ferry Reservoir is unreasonable as against the claims of upstream users. (Carryover storage not in itself a beneficial use; size of reservoir not concomitant with size of right; Bureau is not entitled to insist on continued flows where the proposed depletion could be offset with stored water; purposes of Canyon Ferry discussed; sales of water to Montana Power Company; etc. [Fifty-one page discussion - FO.]

D-21.310

Language of 1981 statute makes express what was implicit before. No prejudice to applicant in applying 1981 statute.

D-21.310

Objectors have no right to expeditious processing of application; therefore, lower burden of proof (1981 statute) on applicant not prejudicial.

E-22.480

Official notice not taken of Pick-Sloan Plan; rather it was used to decipher congressional intent. [FO]

E-22.480

Notice taken of certain technical matters proper because the matters noticed are within our experience, technical competence, and specialized knowledge. [FO]

E-22.480

L-1.940

Prior administrative decisions play a **stare decisis** role, if only because treating similarly situated individuals in a varying fashion amounts to arbitrary and capricious action. [FO]

E-24.4831

J-21.800

S-21.6621

Department has authority to inquire into the scope and extent of existing rights in order to fulfill its statutory duties. However, such inquiry and the decisions based thereon are in no way an adjudication of the existing right, as the administrative determination is of a different character than that of the court; thus, the application of the doctrine of collateral estoppel in the water court is precluded. [FO]

S-21.6621

Findings and conclusions of **In re Brown** adopted herein, and Montana Power Company and Bureau of Reclamation are collaterally estopped from relitigating the scope of their water rights already determined therein.

[Permit granted.]

<b>Final Order Date:</b>	04/24/84 (G W/C)	<b>Applicant:</b>	Jefferson River Acres & Lane
<b>Case #/Type:</b>	11493-s41G (P) 15211-s41G (P) (Lane)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	02/28/77 09/15/77 (Lane)	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	1982	<b>Use:</b>	Irrigation

[See also 16696, Jack Creek Ranch.]

**B-21.780** [Discussion with citations on allocation of the burden of proof.]

**B-24.4879** Bureau of Reclamation's means of diversion of water at Canyon Ferry Reservoir is unreasonable as against the claims of upstream users. (Carryover storage not in itself a beneficial use; size of reservoir not concomitant with size of right; Bureau is not entitled to insist on continued flows where the proposed depletion could be offset with stored water; purposes of Canyon Ferry discussed; sales of water to Montana Power Company; etc. [Fifty-one page discussion - FO.]

**E-22.480** Official notice not taken of Pick-Sloan Plan; rather it was used to decipher congressional intent. [FO]

**E-22.480** Notice taken of certain technical matters proper because the matters noticed are within our experience, technical competence, and specialized knowledge. [FO]

**E-22.480** Prior administrative decisions play a **stare decisis** role, if only because treating similarly situated individuals in a varying fashion amounts to arbitrary and capricious action. [FO]

**E-22.480** Purported determination of water right in court case not dispositive  
**E-24.4831** where decision voided for lack of subject matter jurisdiction  
**S-21.6621** However, findings made in such case may not be void for all purposes.

**E-22.480** Notices of appropriation not in strict compliance with statute are  
**E-24.4831** not **prima facie** evidence of matters asserted therein. Further, water must be beneficially used to create right, but notices at best show intent to appropriate and not consummation thereof. Accordingly, to show existence of right, evidence re actual use is necessary in addition to notices.

**E-24.480** The duty of the upstream user then in all events is only to allow  
**U-14.1259** the volume of water reflected by the natural flow of the Missouri to reach Montana Power Company's hydroelectric facilities at such times that such flows are less than the turbine capacities of same. To the extent that Canyon Ferry is drafting from storage, upstream diversions can make use of natural flows as the necessary effect of such stored waters is to augment the flows of the Missouri.

**E-24.4831** [Discussion re extent of Bureau of Reclamation water rights in Canyon Ferry; types of appropriative uses recognized as part of such rights.]

**E-24.4831** Except for Helena Valley, which area was specifically contemplated as a place of use for Canyon Ferry waters, the Bureau has failed to

demonstrate an appropriative intent to sell water to private irrigators.

- E-24.4831** Even if Canyon Ferry is with authority and has appropriated water for sale, no protection for this use as against the claims of other appropriators can be had absent the actual sale of the use of such waters.
- E-24.4831** Montana Power Company's vested right to maintenance of the stream conditions at the time of the appropriation (Cochran Dam, built after Canyon Ferry) does not embrace any vested interest in the continuation of wasteful conditions on a stream.
- E-24.4831**  
**J-21.800**  
**S-21.6621** Department has authority to inquire into the scope and extent of existing rights in order to fulfill its statutory duties. However, However, such inquiry and the decisions based thereon are in no way an adjudication of the existing right, as the administrative determination is of a different character than that of the court; thus, the application of the doctrine of collateral estoppel in the water court is precluded. [FO]
- E-24.4831** Montana court has held that appropriation for sale is perfected upon completion of the appropriation works. However, the Bailey rule does not appear to sanction the diversion of such waters until the same are required or needed for the purposes of the appropriation.
- E-24.4879** The Bureau of Reclamation cannot maintain storage at maximum level merely to maximize its power production. To command an entire source merely to extract a small portion thereof for beneficial use is unreasonable means of diversion. It is wasteful of the resource.
- E-24.4879**  
**S-20.720** The Bureau of Reclamation can reasonably exercise its right which includes the right to carry over storage, if upstream development continues.
- E-24.4894**  
**F-5.250** Further, so much of Montana Power's claim against upstream development that is predicated on the use of return flows from Canyon Ferry has been preempted by the federal purpose evident in the construction of Canyon Ferry, *i.e.*, to regulate the flows of the Missouri to satisfy Montana Power's rights so that upstream development could take place.
- F-5.250** Application of the above rule does not impinge on any federal purpose evident in the reclamation laws.
- T-5.800**  
**U-14.1259**  
**W-1.870** There are unappropriated waters in the source of supply, and there is no need to limit period of diversion to periods when Chocran is is spilling (as was done **In re Pettapiece, In re Monforton, and In re North Boulder Drainage District**, where no showing of the Bureau of Reclamation's wasteful practices was made) as such limitation is unwarranted in view of the waste at Canyon Ferry.

<b>Final Order Date:</b>	04/24/84 (G W/C)	<b>Applicant:</b>	Brown, Don L.
<b>Case #/Type:</b>	12016-s41G (P)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	03/31/77	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	Est. 1983	<b>Use:</b>	Irrigation

**B-21.780** [Discussion with citations on allocation of the burden of proof.]

**B-24.4879** Bureau of Reclamation's means of diversion of water at Canyon Ferry Reservoir is unreasonable as against the claims of upstream users.



(Carryover storage not in itself a beneficial use; size of reservoir not concomitant with size of right; Bureau is not entitled to insist on continued flows where the proposed depletion could be offset with stored water; purposes of Canyon Ferry discussed; sales of water to Montana Power Company; etc. [Fifty-one page discussion - FO.]

- E-22.480** Official notice not taken of Pick-Sloan Plan; rather it was used to decipher congressional intent. [FO]
- E-22.480** Notice taken of certain technical matters proper because the matters noticed are within our experience, technical competence, and specialized knowledge. [FO]
- E-22.480**  
**L-1.940** Prior administrative decisions play a **stare decisis** role, if only because treating similarly situated individuals in a varying fashion amounts to arbitrary and capricious action. [FO]
- E-22.480**  
**E-24.4831** Notices of appropriation not in strict compliance with statute are not **prima facie** evidence of matters asserted therein. Further, water must be beneficially used to create right, but notices at best show intent to appropriate and not consummation thereof. Accordingly, to show existence of right, evidence re actual use is necessary in addition to notices.
- E-22.480**  
**E-24.480**  
**S-21.6625** Purported determination of water right in court case not dispositive where decision voided for lack of subject matter jurisdiction. However, findings made in such case may not be void for all purposes.
- E-24.480**  
**U-14.1259** The duty of the upstream user then in all events is only to allow the volume of water reflected by the natural flow of the Missouri to reach Montana Power Company's hydroelectric facilities at such times that such flows are less than the turbine capacities of same. To the extent that Canyon Ferry is drafting from storage, upstream diversions can make use of natural flows as the necessary effect of such stored waters is to augment the flows of the Missouri.
- E-24.4831** [Discussion re extent of Bureau of Reclamation water rights in Canyon Ferry; types of appropriative uses recognized as part of such rights.]
- E-24.4831** Except for Helena Valley, which area was specifically contemplated as a place of use for Canyon Ferry waters, the Bureau has filed to demonstrate an appropriative intent to sell water to private irrigators.
- E-24.4831** Even if Canyon Ferry is with authority and has appropriated water for sale, no protection for this use as against the claims of other appropriators can be had absent the actual sale of the use of such waters.
- E-24.4831** Montana Power Company's vested right to maintenance of the stream conditions at the time of the appropriation (Cochran Dam, built after Canyon Ferry) does not embrace any vested interest in the continuation of wasteful conditions on a stream.
- E-24.4831** Montana court has held that appropriation for sale is perfected upon completion of the appropriation works. However, the **Bailey** rule does not appear to sanction the diversion of such waters until the same are required or needed for the purposes of the appropriation.

**E-24.4831** The Bureau of Reclamation can reasonably exercise its right which includes the right to carry over storage, if upstream development continues.

**E-24.4831**  
**J-21.800**  
**S-21.6621** Department has authority to inquire into the scope and extent of existing rights in order to fulfill its statutory duties. However, such inquiry and the decisions based thereon are in no way an adjudication of the existing right, as the administrative determination is of a different character than that of the court; thus, the application of the doctrine of collateral estoppel in the water court is precluded. [FO]

**E-24.4879** The Bureau of Reclamation cannot maintain storage at maximum level merely to maximize its power production. To command an entire source merely to extract a small portion thereof for beneficial use is unreasonable means of diversion. It is wasteful of the resource.

**E-24.4894**  
**F-5.250** Further, so much of Montana Power's claim against upstream development that is predicated on the use of return flows from Canyon Ferry has been preempted by the federal purpose evident in the construction of Canyon Ferry, *i.e.*, to regulate the flows of the Missouri to satisfy Montana Power's rights so that upstream development could take place.

**F-5.250** Application of the above rule does not impinge on any federal purpose evident in the reclamation laws.

**T-5.800**  
**U-14.1259**  
**W-1.870** There are unappropriated waters in the source of supply, and there is no need to limit period of diversion to periods when Cochran is spilling (as was done *In re Pettapiece, In re Monforton, and In re North Boulder Drainage District*, where no showing of the Bureau of Reclamation's wasteful practices was made) as such limitation is unwarranted in view of the waste at Canyon Ferry.

<b>Final Order Date:</b>	04/24/84 (G W/C)	<b>Applicant:</b>	Jack Creek Ranch Trust thru Richard K. Webel, Trustee
<b>Case #/Type:</b>	16696-s41F (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	12/19/77	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	1982	<b>Use:</b>	Irrigation/Stock

**A-4.930** The proposed appropriation will not adversely affect prior rights as applicant is junior to these uses, and as the water to be appropriated is not inevitably otherwise required for downstream use.

**A-16.7516** Compromise reached at hearing resulting in shortening in period of appropriation does not belie the existence of bona fide intent.

**B-21.780** Objector bears burden of going forward with evidence such that reasonable minds might differ over the scope and extent of their water rights. This burden derives from necessity of objector demonstrating cognizable interest in the proceedings.

**B-21.780** [Discussion with citations on allocation of the burden of proof.]

**B-24.4879** Bureau of Reclamation's means of diversion of water at Canyon Ferry Reservoir is unreasonable as against the claims of upstream users. (Carryover storage not in itself a beneficial use; size of reservoir not concomitant with size of right; Bureau is not entitled to insist

on continued flows where the proposed depletion could be offset with stored water; purposes of Canyon Ferry discussed; sales of water to Montana Power Company; etc. [Fifty-one page discussion - FO.]

- E-22.480** Official notice not taken of Pick-Sloan Plan; rather it was used to decipher congressional intent. [FO]
- E-22.480** Notice taken of certain technical matters proper because the matters noticed are within our experience, technical competence, and specialized knowledge. [FO]
- E-22.480**  
**L-1.940** Prior administrative decisions play a **stare decisis** role, if only because treating similarly situated individuals in a varying fashion amounts to arbitrary and capricious action. [FO]
- E-22.480**  
**E-24.480**  
**S-21.6625** Purported determination of water right in court case not dispositive where decision voided for lack of subject matter jurisdiction. However, findings made in such case may not be void for all purposes.
- E-22.480**  
**E-24.4831** Notices of appropriation not in strict compliance with statutory are not **prima facie** evidence of matters asserted therein. Further, water must be beneficially used to create right, but notices at best show intent to appropriate and not consummation thereof. Accordingly, to show existence of right, evidence re actual use is necessary in addition to notices.
- E-24.480**  
**U-14.1259** The duty of the upstream user then in all events is only to allow the volume of water reflected by the natural flow of the Missouri to reach Montana Power Company's hydroelectric facilities at such times that such flows are less than the turbine capacities of same. To the extent that Canyon Ferry is drafting from storage, upstream diversions can make use of natural flows as the necessary effect of such stored waters is to augment the flows of the Missouri.
- E-24.4831** [Discussion re extent of Bureau of Reclamation water rights in Canyon Ferry; types of appropriative uses recognized as part of such rights.]
- E-24.4831** Except for Helena Valley, which area was specifically contemplated as a place of use for Canyon Ferry waters, the Bureau has filed to demonstrate an appropriative intent to sell water to private irrigators.
- E-24.4831** Even if Canyon Ferry is with authority and has appropriated water for sale, no protection for this use as against the claims of other appropriators can be had absent the actual sale of the use of such waters.
- E-24.4831** Montana Power Company's vested right to maintenance of the stream conditions at the time of the appropriation (Cochran Dam, built after Canyon Ferry) does not embrace any vested interest in the continuation of wasteful conditions on a stream.
- E-24.4831** Not necessary here to decide whether the **prima facie** statutory derivatives of filing of notices of appropriation survive repeal of sponsoring statute for purposes of determining whether right exists.
- E-24.4831** Montana court has held that appropriation for sale is perfected upon completion of the appropriation works. However, the Bailey rule does

not appear to sanction the diversion of such waters until the same are required or needed for the purposes of the appropriation.

- E-24.4831**  
**J-21.800**  
**S-21.6621** Department has authority to inquire into the scope and extent of existing rights in order to fulfill its statutory duties. However, such inquiry and the decisions based thereon are in no way an adjudication of the existing right, as the administrative determination is of a different character than that of the court; thus, the application of the doctrine of collateral estoppel in the water court is precluded. [FO]
- E-24.4879** The Bureau of Reclamation can reasonably exercise its right, which includes the right to carry over storage, if upstream development continues.
- E-24.4879** The Bureau of Reclamation cannot maintain storage at maximum level merely to maximize its power production. To command an entire source merely to extract a small portion thereof for beneficial use is unreasonable means of diversion. It is wasteful of the resource.
- E-24.4894**  
**F-5.250** Further, so much of Montana Power's claim against upstream development that is predicated on the use of return flows from Canyon Ferry has been preempted by the federal purpose evident in the construction of Canyon Ferry, *i.e.*, to regulate the flows of the Missouri to satisfy Montana Power's rights so that upstream development could take place.
- F-5.250** Application of the above rule does not impinge on any federal purpose evident in the reclamation laws.
- M-5.1188**  
**S-15.920** Applicant has dug drainage ditches to remove excess water which has subirrigated and saturated his land naturally. Applicant will control the operation of these ditches to allow waters to subirrigate within the root zone of alfalfa crop. Held, this means of diversion is reasonable and will not result in waste of resource. However, this should not be construed to vest an interest in applicant in this particular means of diversion.
- S-15.920** Groundwaters herein are tributary to surface stream flows of Madison, and are therefore surface waters for purposes herein.
- T-5.800**  
**U-14.1259**  
**W-1.870** There are unappropriated waters in the source of supply and there is no need to limit period of diversion to periods when Cochran is spilling (as was done **In re Pettapiece, In re Monforton, and In re North Boulder Drainage District**, where no showing of the Bureau of Reclamation's wasteful practices was made) as such limitation is unwarranted in view of the waste at Canyon Ferry.
- U-14.1259.25** Some of the waters herein are properly termed salvage as they are saved by eradication of phreatophytes. However, some waters are tributary to surface source, and the relative percentages of each remain unknown. Further one may not claim he has developed water by removal of phreatophytes. Held, salvage not pivotal to determination of unappropriated water.

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<b>Final Order Date:</b>	04/24/84 (G W/C)	<b>Applicant:</b>	Robbie
<b>Case #/Type:</b>	20301-s41F (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	09/14/78	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	1982	<b>Use:</b>	Irrigation

**B-21.780** [Discussion with citations on allocation of the burden of proof.]

**B-21.780**                    Objector must produce evidence demonstrating its interest in the  
**S-20.110**                    administrative proceeding.

**B-24.4879**                    Bureau of Reclamation's means of diversion of water at Canyon Ferry  
Reservoir is unreasonable as against the claims of upstream users.  
(Carryover storage not in itself a beneficial use; size of reservoir  
not concomitant with size of right; Bureau of Reclamation is not  
entitled to insist on continued flows where the proposed depletion  
could be offset with stored water; purposes of Canyon Ferry  
discussed; sales of water to Montana Power Company, etc.) [FO - 51-  
page discussion.]

**E-22.480**                    Official notice not taken of Pick-Sloan Plan; rather it was used to  
decipher congressional intent. [FO]

**E-22.480**                    Notice taken of certain technical matters proper because the matters  
noticed are within our experience, technical competence, and  
specialized knowledge. [FO]

**E-22.480**                    Prior administrative decisions play a **stare decisis** role, if only  
**L-1.940**                    because treating similarly situated individuals in a varying fashion  
amounts to arbitrary and capricious actions. [FO]

**E-22.480**                    Purported determination of water right in court case not dispositive  
**E-24.480**                    where decision voided for lack of subject matter jurisdiction.  
**S-21.6625**                    However, findings made in such case may not be void for all  
purposes.

**E-24.480**                    The duty of the upstream user then in all events is only to allow  
**U-14.1259**                    the volume of water reflected by the natural flow of the Missouri to  
reach Montana Power's hydroelectric facilities at such times that  
such flows are less than the turbine capacities of same. To the  
extent that Canyon Ferry is drafting form storage, upstream  
diversions can make use of natural flows as the necessary effect of  
such stored waters is to augment the flows of the Missouri.

**E-24.4831**                    [Discussion re extent of Bureau of Reclamation water rights in  
Canyon Ferry; types of appropriative uses recognized as part of such  
rights.]

**E-24.4831**                    Except for Helena Valley, which area was specifically contemplated  
as a place of use for Canyon Ferry waters, the Bureau of Reclamation  
has failed to demonstrate an appropriative intent to sell water to  
private irrigators.

**E-24.4831**                    Even if Canyon Ferry is with authority and has appropriated water  
for sale, no protection for this use as against the claims of other  
appropriators can be made absent the actual sale of the use of such  
waters.

**E-24.4831**                    Montana Power's vested right to maintenance of the stream conditions  
at the time of the appropriation (Cochran Dam, built after Canyon  
Ferry) does not embrace any vested interest in the continuation of  
wasteful conditions on a stream.

**E-24.4831**                    Not necessary here to decide whether the **prima facie** statutory  
derivatives of filing of notices of appropriation survive repeal of  
sponsoring statute for purposes of determining whether right exists.

**E-24.4831**                    Montana court has held that appropriation for sale is perfected upon  
completion of the appropriation works. However, the Bailey rule does

not appear to sanction the diversion of such waters until the same are required or needed for the purposes of the appropriation.

**E-24.4831**  
**J-21.800** Department has authority to inquire into the scope and extent of existing rights in order to fulfill its statutory duties. However, such inquiry and the decisions based thereon are in no way an adjudication of the existing right, as the administrative determination is of a different character than that of the court; thus, the application of the doctrine of collateral estoppel in the water court is precluded. [FO]

**E-24.4879** The Bureau of Reclamation can reasonably exercise its right which includes the right to carry over storage, if upstream development continues.

**E-24.4879** The Bureau of Reclamation cannot maintain storage at maximum level merely to maximize its power production. To command an entire source merely to extract a small portion thereof for beneficial use is unreasonable means of diversion. It is wasteful of the resource.

**E-24.4894**  
**F-5.250** Further, so much of Montana Power's claim against upstream development that is predicated on the use of return flows from Canyon Ferry has been preempted by the federal purpose evident in the construction of Canyon Ferry, *i.e.*, to regulate the flows of the Missouri to satisfy Montana Power's rights so that upstream development could take place.

**F-5.250** Application of the above rule does not impinge on any federal purpose evident in the reclamation laws.

**T-5.800**  
**U-14.120**  
**W-1.870** There are unappropriated waters in the source of supply and there is no need to limit period of diversion to periods when Cochran is spilling (as was done in **In re Pettapiece**, **In re Monforton**, and **In re North Boulder Drainage District**, where no showing of the Bureau's wasteful practices was made), as such limitation is unwarranted in view of the waste at Canyon Ferry.

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<b>Final Order Date:</b>	04/24/84 (G W/C)	<b>Applicant:</b>	Hensley
<b>Case #/Type:</b>	21949-s41I (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	02/26/79	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	1982	<b>Use:</b>	Irrigation

**A-4.930** Applicant's proposed use will not inevitably or necessarily capture waters otherwise required for downstream demand, nor will applicant's right be unadministrable in times of scarcity when her junior status will force curtailment in deference to senior requirements. Held, no adverse effect to prior rights.

**A-4.9373**  
**E-24.4831**  
**J-21.800** An appropriator may not extend the time or extent of use without initiating a new water right.

**B-5.6979** Use of 741 acre-feet for stated purposes is unreasonable.

**B-21.780**  
**D-21.310** Objectors can claim no prejudice by lessening of applicant's burden of proof by change in statute.

**D-21.310**  
**E-22.480** New statutory language merely makes explicit what was formerly implicit. Therefore, can use new statute in case where application filed prior to its effective date.

E-22.480 Substantial credible evidence means such evidence that a reasonable mind will accept as supporting a particular conclusion.

L-1.940 Principles of **stare decisis** and collateral estoppel dictate  
S-21.6621 deference to prior Department decisions (**In re Brown**, etc.)  
U-14.1259 regarding objectors', Bureau of Reclamation, and Montana Power Company's existing water rights, and whether there is unappropriated water in the source. In these decisions, it was determined that there is unappropriated water in the source.

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Final Order Date:	04/24/84 (G W/C)	Applicant:	Iverson
Case #/Type:	22188-s41I (P)	Regional Office:	Lewistown
Application Date:	03/26/79	Examiner:	Williams
Hearing Date:	1982	Use:	Irrigation

A-4.930 No adverse effect as use will not inevitably or necessarily capture waters otherwise required for downstream demand, and in times of scarcity applicant's uses will be junior to such demand.

B-21.7808 [Discussion with citations on allocation of the burden of proof.]

B-24.4879 Bureau of Reclamation's means of diversion of water at Canyon Ferry Reservoir is unreasonable as against the claims of upstream users. (Carryover storage not in itself a beneficial use; size of reservoir not concomitant with size of right; Bureau of Reclamation is not entitled to insist on continued flows where the proposed depletion could be offset with stored water; purposes of Canyon Ferry discussed; sales of water to Montana Power Company, etc.) [FO - 51-page discussion.]

D-21.310 No prejudice in applying 1981 statute although application filed prior to effective date.

E-22.480 Official notice not taken of Pick-Sloan Plan; rather it was used to decipher congressional intent. [FO]

E-22.480 Notice taken of certain technical matters proper because the matters noticed are within our experience, technical competence, and specialized knowledge. [FO]

E-22.480 Prior administrative decisions play a **stare decisis** role, if only  
L-1.940 because treating similarly situated individuals in a varying fashion amounts to arbitrary and capricious actions. [FO]

E-24.4831 Department has authority to inquire into the scope and extent of  
J-21.800 existing rights in order to fulfill its statutory duties. However,  
S-21.6621 such inquiry and the decisions based thereon are in no way an adjudication of the existing right, as the administrative determination is of a different character than that of the court; thus, the application of the doctrine of collateral estoppel in the water court is precluded. [FO]

S-15.920 Waste and seepage waters are subject to appropriation.  
W-1.870

S-21.6621 Principles of **stare decisis** and collateral estoppel dictate  
U-14.1259 deference to prior Department decisions (**In re Brown**, etc.)  
L-1.940 regarding objector Bureau of Reclamation existing water rights, and whether there is unappropriated water in the source. In these decisions, it was determined the Bureau of Reclamation is wasting water and thus that there is unappropriated water in the source.

<b>Final Order Date:</b>	04/24/84 (G W/C)	<b>Applicant:</b>	Anderson Ranch
<b>Case #/Type:</b>	24550-s41QJ (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	09/27/79	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	1983	<b>Use:</b>	Irrigation

  

**A-16.750**      The 1979 version of the statute controls the disposition of this  
**L-1.940**      application as that was the law in effect at the time of its filing.

**B-5.6979**      Appropriator is entitled to the most water he can reasonably use for  
his purposes. Thus, amount granted not limited to amount needed in  
wet years. [FO]

**B-21.780**      Objector has burden of production as to scope and extent of its  
water rights.

**E-22.480**      The Pick-Sloan Plan is an instrument reflecting legislative intent.  
**L-1.940**      As such, it is the subject of argument, not fact finding, and  
therefore, its consideration herein has nothing to do with official  
notice. Deciphering the law is not controlled by evidentiary  
boundaries. [FO]

**E-22.480**      An applicant may not insulate his own junior use by "pointing  
**U-14.1259**      fingers" at other wasteful or "inferior" uses. [FO]

**E-24.4831**      Montana Power Company's asserted "right" to increased flows made  
available by Canyon Ferry operations are not part of Montana Power  
Company's rights as against the applicant by virtue of federal law.  
**See In re Brown.** [FO]

**E-24.4831**      **Prima facie** effect of claim does not supplant need for evidence  
detailing the amount of water put to beneficial use. [FO]

**E-24.4831**      [Memorandum: Federal preemption of state appropriation law; Montana  
**F-5.250**      Power Company's rights no more than the direct flow of the Missouri  
**U-14.1259**      without Canyon Ferry; the measure of additional flow attendant to  
the returns from the bureau's use at Canyon Ferry is available for  
appropriation by users downstream from Canyon Ferry (**e.g.**,  
applicant) as against the claims of Montana Power Company.]

**S-15.920**      Appropriation of tail waters expressly recognized in Montana. [FO]

**U-14.120**      The reach of § 85-2-311(1)(a), MCA, is met when the factors indicate  
that there is unappropriated water in the source in the amount  
applicant seeks throughout the period of use in at least some years.  
[FO]

  

<b>Final Order Date:</b>	05/03/84 (D)	<b>Applicant:</b>	Evans
<b>Case #/Type:</b>	28744-g40A (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	08/18/80	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	11/01/83	<b>Use:</b>	Irrigation

  

**A-4.9395**      Uncontradicted evidence that proposed well will reduce flow of  
spring which supplies Half Breed Creek upon which objector has water  
right. Held, reduction in flow would adversely affect objectors who  
probably could not reasonably exercise their water right if spring  
flow reduced. Failure of application to contradict is failure of  
proof of no adverse effect.

**E-22.480**      Right to cross-examine is a constitutional right. Must be protected



under any rules of evidence.

[Permit denied.]

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<b>Final Order Date:</b>	05/30/84 (G W/C)	<b>Applicant:</b>	Chaffee
<b>Interlocutory Order:</b>	03/06/84		
<b>Case #/Type:</b>	34204-s42M (P)	<b>Regional Office:</b>	Miles City
<b>Application Date:</b>	06/11/81	<b>Examiner:</b>	Williams/Elting
<b>Hearing Date:</b>	None	<b>Use:</b>	Stock/Recreation

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**A-4.9373** As concluded in previous permit, objectors are entitled to their historic pattern of use, therefore, drainage device necessary.

**A-16.750** Although the doctrine of **res judicata** may not apply in  
**S-21.6621** administrative proceedings, the branch thereof known as collateral estoppel applies where a prospective appropriator attempts to relieve himself of conditions placed on prior permits issued to him or his predecessors by abandoning same and attempting to subject objectors to those permits to new proceedings involving the identical issues.

**S-21.6621** Collateral estoppel applies where the same land, same reservoir, same uses of water, same objectors and objections are involved as well as substantially the same quantity of water, even if applicant is not the same.

**S-21.6621** Applicant in this case did not show cause for avoidance of summary determination by collateral estoppel of the issues of the validity of objector's water rights, and the necessity of installing a drainage device in dam structure. Applicant barred from relitigating these issues. [IO - **see** memo attached for complete discussion as to why applicant failed to show good cause.]

**S-21.6621** To avoid summary determination by collateral estoppel (that certain  
**T-5.800** terms and conditions imposed on a previous permit must be incorporated in the permit presently applied for) applicant must show that former proceedings on an identical application did not provide a full and fair opportunity to litigate the issues, or that the permit previously issued was unjust or inequitable.

[Permit granted with conditions.]

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<b>Final Order Date:</b>	06/14/84 (G W/C)	<b>Applicant:</b>	Miller Colony, Inc.
<b>Case #/Type:</b>	31711-g410 (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	02/13/81	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	10/12/83	<b>Use:</b>	Irrigation

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**A-4.9395** Guthrie drain ditch used to collect water for irrigation. Held  
**U-14.1259** applicant's pit which collects subsurface water will not adversely affect Guthrie's right (if permit conditioned to preclude applicant's diversion, when water table rises to level of Guthrie's ditch.)

**A-16.750** Where evidence shows that applicant does not require a minimum amount of water to operate the proposed appropriation, application treated as asking for up to and including the amount stated.

**A-16.7567** Objector had actual but not formal notice of change in application.  
**D-21.310** Held, objector not denied due process right of notice.

**D-21.310** The informal nature of the permit hearing demands that the Department (examiner) assist unrepresented parties in their presentation for the record.

**E-22.480** The content of a previous decision of the Department is not a fact subject to official notice.

**J-21.800** Department's authority to condition permit limited to conditions designed to protect water rights, not to settle ongoing disputes. Accordingly, not all portions of stipulated settlement included as permit conditions. [FO]

**T-5.800**

**L-1.940** Since 1972, all waters in the state of Montana regardless of manner of occurrence are subject to the system of prior appropriation.

**S-15.920**

**R-5.930** No evidence may be taken at the exception to proposal stage. [FO]

**S-15.920** However, groundwater as defined in the statute may be subject to a separate system of priorities governing ground water only.

**S-21.660** Motions to dismiss made at the end of applicant's case in chief, at the end of Department's testimony, and at the closing of the record denied. Held, dismissal at early stages of hearing is contrary to the contested case provisions of MAPA, and further that applicant put on sufficient evidence to preclude dismissal under Rule 41(6), M.R.Civ.P.

**U-14.120** It is not necessary to delay issuance of permit pending completion of study of area subsurface water. Held, decision made on present evidence proper; if insufficient unappropriated water in aquifer, can modify permit at verification. [FO]

[Permit granted, with conditions.]

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<b>Final Order Date:</b>	06/14/84 (D)	<b>Applicant:</b>	Mancoronal
<b>Case #/Type:</b>	43117-s41P (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	?	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	12/12/83	<b>Use:</b>	Irrigation

**A-4.930** Permit would be downstream from Senior A, but upstream from another appropriator (Senior B) who is senior to both Senior A and permittee. Held, Senior A would be adversely affected should Senior B choose to call Senior A instead of the permittee, as Senior A, could not call the permittee, as permittee is downstream and his release of water would do Senior A no good.

**A-4.930** Applicant has a senior water right in addition to the right he is applying for. Held, because he could divert early in the irrigation season during high water under the new right, then divert later in the season during low water under the senior right, the burden on the source could increase during the later part of the season thereby adversely affecting those appropriators with rights junior to his senior right.

**U-14.1259** Whether in determining whether unappropriated water available, the Department may look beyond the SB #76 statements of claim and examine actual water use need not be addressed because no evidence of actual water use was provided at hearing anyway. [FO]

[Permit denied.]

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<b>Final Order Date:</b>	07/25/84 (G W/C)	<b>Applicant:</b>	Lehrer
<b>Case #/Type:</b>	35527-s41H (P)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	07/22/81	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	10/05/83	<b>Use:</b>	Stock Water

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**A-4.9348.48** Because use is nonconsumptive proof that sufficient water physically present at point of diversion fulfills § 85-2-311(1)(a), MCA.

**A-4.9348.48** Pond to be used for fishing, ice skating, and watering two horses. Held, these are nonconsumptive uses. [?]

**A-16.7576** Because amendment simply reduced quantity of water sought from that published and sought no other changes, no republication required.

**A-16.7516** An applicant cannot file his application without present intent to appropriate, and then, by successive requests for continuance, maintain that priority date for later development.

**A-16.7567** Amendment to application proposed at hearing. Objection thereto by  
**D-21.310** current objectors overruled as record shows they had actual notice of the amendment.

**B-5.6934** Whether a private appropriator may divert, impound, or withdraw  
**J-21.800** water for private fish and wildlife use need not be decided herein because the stock use which encompasses the same pond may be granted.

**D-21.310** However, objection to admission of document based on deprivation of  
**E-22.480** fundamental right of cross-examination could be sustained if right violated.

**D-21.310** Where public agency prepared document in course of ordinary business  
**E-22.480** that document entitled to greater "respect" than regular hearsay. No fundamental right denied by its admission.

**D-21.310** Document prepared by private entity not present for cross-  
**E-22.480** examination admitted solely for purpose of showing applicant's **bona fide** intent to appropriate. No abridgment of fundamental right.

**E-22.480** Objection that inability to cross-examine author of document rendered same inadmissible, overruled as formal rules of evidence regarding hearsay do not apply herein.

**E-24.4834** Instream private fish and wildlife appropriations do not exist in Montana. Not considered beneficial use.

**J-21.800** Averred that pond not necessary for watering stock from source and  
**M-5.110** therefore permit need not issue. Held, the mere existence of alternative means of appropriating water does not necessitate the denial of the permit. An appropriator may not be forced to use the most efficient means, only a reasonable one. [FO]

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<b>Final Order Date:</b>	08/07/84 (D)	<b>Applicant:</b>	Carney
<b>Case #/Type:</b>	53221-s40Q (P)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	07/21/83	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	04/17/84	<b>Use:</b>	Recreation

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**B-5.690** Storing of water is not a beneficial use per se.  
**S-20.720**

**D-21.930** Applicant made no showing that the full requested 270 acre-feet is necessary for recreational use. Held, applicant has not shown that the amount of water requested will be put to beneficial use, and no permit may issue.

**E-22.480** The naked assertion that a proposed use is for "recreation" does not show beneficial use. Applicant must be more specific.

**M-5.110** Applicant failed to prove appropriation works adequate by failing to submit plans for construction of reservoir.

**S-20.720**

[Exceptions filed; above holdings sustained.]

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<b>Final Order Date:</b>	09/07/84 (G W/C)	<b>Applicant:</b>	Meyer
<b>Case #/Type:</b>	42727-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	03/24/82	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	None	<b>Use:</b>	Irrigation

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**B-21.780** Parties having withdrawn their objections, implicitly stipulate to the existence of all statutory criteria for permit issuance. Held, criteria met. [Permit granted.]

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<b>Final Order Date:</b>	09/14/84 (G W/C)	<b>Applicant:</b>	Orem
<b>Case #/Type:</b>	18845-s76LJ (P)	<b>Regional Office:</b>	Kalispell
	18846-s76LJ (P)		
<b>Application Date:</b>	05/08/78	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	01/19/84	<b>Use:</b>	Irrigation/Stock

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**A-4.930** Potential impact of proposed appropriation on game and wildlife habitat not adverse effect within meaning of statute.

**A-4.930** Statute does not prevent issuance of permit because of possible adverse effects to unidentified appropriators whose existence has only been alleged.

**E-22.480**

**S-20.110**

**A-4.9395** Wells located in "deep" aquifer, or in shallow aquifer outside of three-quarter mile cone of depression will not be adversely affected.

**A-4.9395** Since there is no evidence in the record to suggest there is any hydrological connection between the applicant's source and Morning Slough, or between Morning Slough and the Brabham well, Mr. Brabham's implied chain of adverse effect is unfounded. [FO]

**S-15.920**

**E-24.4879** Objector's prior rights do not entitle them to prevent changes in the conditions of water occurrence in the source if they can reasonably exercise their rights after the change.

**E-24.4879** While a subirrigator does have a water right, the extent of that right is the volume of water. The means of diversion, however, is unreasonable and will not be protected. A water user is not entitled to continue receiving a volume by means of subirrigation.

**M-5.1188**

[Permit granted.]

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<b>Final Order Date:</b>	05/03/84 (G W/C)	<b>Applicant:</b>	Hunt
<b>Case #/Type:</b>	33484-g40A (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	03/19/81	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	11/01/83	<b>Use:</b>	Irrigation

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**A-4.9383** Pumping water from mine connected to river by aquifer will have only minimal effect on Mussellshell River.

**A-4.9395** Although it is clear that unappropriated water exists in the mine, there is the possibility that natural recharge to the mine is insufficient to supply applicant's needs. If not, his pumping may adversely affect objectors' wells by inducing increased flow from their aquifer. However, the evidence indicates the likelihood of this is minimal.

**A-4.9395** The mere possibility that objectors' water pressure might be reduced is insufficient to constitute adverse effect.

**A-4.9395** If existing wells can still be reasonably operated, mere effects  
**E-22.9879** thereon are not adverse.

**S-15.920** Source of supply is hydrologically related to Mussellshell and therefore is not groundwater within the meaning of the Water Use Act.

[Permit granted.]

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<b>Final Order Date:</b>	10/09/84 (G W/C)	<b>Applicant:</b>	Johnson, Gordon
<b>Case #/Type:</b>	52062-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	05/02/83	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	03/22/84	<b>Use:</b>	Hydroelectricity

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**A-4.930** Having to hire water commissioner not adverse effect.

**B-21.780** Held, applicant's burden of proof met where all parties have stipulated to the existence of the statutory criteria. (This holding contradicted in later decisions.)

[Proposed order did not accurately reflect the stipulation of the parties. Final Order modified to accurately reflect same.]

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<b>Final Order Date:</b>	10/31/84 (G W/C)	<b>Applicant:</b>	Simpson
<b>Case #/Type:</b>	50240-s40J (P)	<b>Regional Office:</b>	Glasgow
	50241-s41J (P)		
<b>Application Date:</b>	04/16/82	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	01/05/84	<b>Use:</b>	Irrigation

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**A-4.930** Even if bureau "uses" seepage from slough, the means of diverting it  
**E-24.4894** into the Milk River is tantamount to subirrigation which is an  
**M-5.1188** unreasonable and thus unprotectable means of diversion. [FO]

**A-4.9394** Because objector cannot capture the seepage from Nelson Reservoir  
**E-24.4894** which provides the main source for applicant's proposed use of  
**U-14.1259** water, it does not matter whether or not objector claims the  
exclusive right to same; the seepage is unappropriated. [See  
attached memorandum for discussion of state and federal precedent re  
recapture and reuse of water by initial appropriator.]

**A-4.9394** Dead storage, seepage from reservoir, and escape of water from

**S-20.720** around headgates are common to storage and diversion facilities. The extent of these losses is not unreasonable; there is no waste.

**B-5.6979** The amount of water applicant seeks is greater than that which can be applied beneficially.

**J-21.800** Because applicants would not divert from the Milk River main stem,  
**W-1.870** and because closure order expressly excludes seepage water tributary to the main stem, Milk River closure does not prevent issuance of permit.

**R-5.300** Objectors' failure to order a transcript of hearing not grounds for challenge to accuracy of findings. [FO]

**U-14.1259** Conditioning permit to prevent applicant's diversion of water when  
**T-5.800** surface flows exist between McNeil slough and the Milk River held adequate to comply with Milk River closure conditions, despite fact that pumping when they are not connected may itself preclude connection in times of marginal flow. [FO]

**U-14.1259** While there may well be some seepage reaching purchasers of Nelson  
**W-1.870** Reservoir, water via percolation of reservoir seepage from McNeil slough into Milk main stem, objector Bureau of Reclamation (seller) does not capture or control the seepage and cannot therefore be considered as "using" the seepage water from Nelson Reservoir. Finding that seepage unappropriated sustained. [FO]

**U-14.1274** Possible future diminution of the source due to potential development of a presently inchoate right held not a ground for denying permit.

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<b>Final Order Date:</b>	10/31/84 (D)	<b>Applicant:</b>	Ernster
<b>Case #/Type:</b>	51938-s42M (P)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	03/16/83	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	03/28/84	<b>Use:</b>	Irrigation

**A-4.9392** Cannot issue permit with period of use described simply as "high spring runoff".

**A-4.9394** Water quality is a protectable element of a water right.

**A-16.7567** Applicant could not make use of source water except at times of  
**B-5.690** extremely high runoff because "Application of North Fork water to  
**W-1.870** irrigation use at any other time would be detrimental". Accordingly, diversion at any other time would result in waste. Period of use shortened.

**B-21.780** Uncontroverted testimony that historic use less than that claimed  
**E-24.4831** held sufficient to rebut presumption of validity of the right created by the filing of the claim. Accordingly, objectors Jarvis/Buxbaum have not met their burden of proof regarding the right.

**E-22.480** The testimony of an expert need not be accorded greater weight than that of farmers of longstanding familiarity with the area.

**E-24.480** If objectors had filed claims for subirrigation rights, they would  
**M-5.1188** at least have a colorable claim to maintenance of stream flow for subirrigation of their pastures.

**E-24.480** An objector is not allowed to prevent subsequent appropriation based

U-14.1259 on an inflated claim, nor is he allowed to assert that more volume was used than has been stated on a claim.

J-21.800 The Department may issue a permit with conditions.  
T-5.800

J-21.800 Cannot issue permit for diversion outside period unappropriated  
U-14.120 water shown available.

L-1.790 Because the application requested 22.28 cfs, the criteria listed in  
L-1.940 § 85-2-311(2), MCA (1983), must be proved, and the applicant is not exempted from this burden simply because the application was filed before the effective date of the statute. The filing of the application creates no vested rights, other than to a priority date as of the date of filing should any permit issue. (In response to this holding, applicant successfully moved to amend its application to request only 14.9 cfs, thereby avoiding 85-2-311(2)).

T-5.800 Unappropriated water exists only during high spring runoff. Held, that without substantial credible evidence quantifying "high spring runoff", any condition or period of use the examiner would impose would be arbitrary and impermissible.

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<b>Final Order Date:</b>	11/01/84 (D)	<b>Applicant:</b>	Brown, Edgar
<b>Case #/Type:</b>	50049-s41I (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	09/28/82	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	05/22/85	<b>Use:</b>	Irrigation

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E-22.480 Evidence of possible applicant infraction of a court order prohibiting applicant from wasting water is irrelevant; the Department is limited to analysis of the proposed appropriation and may not deny same based on applicant's performance in other areas.

E-22.480 Because water availability analysis fails to take into account  
U-14.1259 rights in 1903 decree upon which no SB #76 claims were filed, the analysis is of little use in determining water availability.

E-24.4831 Even though objector failed to file SB #76 claims, until the Water Court issues a decree which conclusively determines that water rights have been abandoned, the stream will be administered pursuant to the rights as established in the 1903 decree, the 1966 update and post-1973 permits and certificates.

M-5.110 The proposed appropriation works are not adequate, but can be made so by cleaning and straightening the ditches, and calibrating the measuring boxes.

U-14.1259 Because seniors on the source do not get their full right even when a water commissioner has been appointed, there is insufficient evidence to find availability of unappropriated water.

[Preliminary Order strikes MPC objection. Regardless, permit denied.]

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<b>Final Order Date:</b>	11/28/84 (G W/C)	<b>Applicant:</b>	Crop Hail Mgmt.
<b>Case #/Type:</b>	41432-g76LJ (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	12/29/81	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	02/06/84	<b>Use:</b>	Domestic/Commercial

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**A-4.9395** Evidence shows that applicant's well should have only a minimal effect on any of objector's wells if pumped at no more than 313 gpm; held no adverse effect to objectors if permit limited to 313 gpm. (Applicant had previously agreed to such reduction from the flow rate initially requested.)

**B-5.6979** Record shows applicant will need only 336 acre-feet per annum; therefore, permit will issue for only 336 acre-feet which is less than the amount requested.

**J-21.800** No permit is required for fire protection purposes.  
**L-1.940**

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<b>Final Order Date:</b>	11/28/84 (G W/C)	<b>Applicant:</b>	Nilson Enterprises
<b>Case #/Type:</b>	50765-s41Q (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	11/15/82	<b>Examiner:</b>	Pengelly
<b>Hearing Date:</b>	05/08/84	<b>Use:</b>	Irrigation

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**E-24.4810** Subirrigation "rights" upon which objector has not filed SB #76 claims are abandoned and are not a basis for objection

**E-24.4831** Water rights applied by subirrigation are recognized as valid  
**M-5.1188** rights. The limit of such rights however is the volume of water necessary to produce a comparable crop utilizing a conventional flood or sprinkler irrigation system.

**E-24.4879** Objector does not have a right to continuance of the existing subirrigation process so long as the right can be reasonably exercised by conventional diversion.

**O-2.490** Untimely objector not entitled to except to proposal. [FO]  
**R-5.930**

**R-5.930** Cannot present evidence in exception to proposal. [FO]  
 [Granted]

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<b>Final Order Date:</b>	12/27/84 (G W/C)	<b>Applicant:</b>	Lockwood Water Users Assn.
<b>Case #/Type:</b>	54172-s43Q (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	03/28/84	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	09/28/84	<b>Use:</b>	Municipal/Industrial Domestic

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**B-5.690** Where an appropriator's actual use depends upon the actions of third parties, **i.e.**, where appropriator is a water supply company, a right to a greater amount than present need may be permitted.

**B-5.690** It is not within the purposes of the permitting procedure to allow municipality a **de facto** reservation for the infinite future in unknown proportion under the aegis of a water sales permit.

**B-5.690** Here, it is the occurrence of the events (population growth) that must necessarily arise before the need to use water arises which is speculative, not the intent.

**B-5.690** The need for water must be contemplated and reasonably foreseeable.



B-5.690 The doctrine of relation back has been incorporated in the permit system

B-5.690 It is reasonable to allow the applicant a present appropriation for the projected population in 1995.

B-21.7835 Regardless of objector's default, applicant retains burden to show that statutory criteria are met.

D-21.910 If applicant's claims are sustained in the adjudication, then no more volume than is set in those claims may be appropriated hereunder as it has not been established that more volume could be beneficially used.

R-5.850 The Department may permit a use which interferes with planned uses for which water has been reserved so long as such interference is not unreasonable.

R-5.850 Under Board Order, Department may issue temporary permit for diversion of reserved waters.

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<b>Final Order Date:</b>	01/02/85 (G W/C)	<b>Applicant:</b>	Hanson
<b>Case #/Type:</b>	49230-s76M (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	12/13/82	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	02/10/84	<b>Use:</b>	Hydroelectricity

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A-4.930 Held, project will not cause alleged additional freezing problems.

A-4.9348.48 Even though creek is overappropriated, a nonconsumptive use may be allowed.

A-4.9348.48 Since water is physically available at the proposed point of diversion, and since all of it will be returned to the stream for downstream use (use is nonconsumptive), despite the fact that the source is overappropriated on paper, there are unappropriated waters in the source of supply.

A-16.750 Applicant can make use of less flow than was requested; accordingly, the amount requested is considered to include lesser flows as well.

U-14.120

A-16.7516 No evidence in record that project so blatantly economically unfeasible as to believe **bona fide** intent.

I-14.870 Objectors do not have standing to object on basis of harm to wild fisheries' use. Fish and Game proper party.

S-20.110

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<b>Final Order Date:</b>	01/03/85 (G W/C)	<b>Applicant:</b>	Pope
<b>Case #/Type:</b>	32257-s76L (P)	<b>Regional Office:</b>	Kalispell
	32236-c76L (C)		
	32237-c76L (C)		
	32238-c76L (C)		
<b>Application Date:</b>	01/09/81	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	None	<b>Use:</b>	Irrigation

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A-4.930 Stipulation implies that there will be no adverse effect to objectors. Held, stipulation satisfies applicant's burden under § 85-2-402, MCA.

B-21.780

A-4.9348 An appropriator may not "change" a greater right than he possesses.

J-21.800

**A-16.7567**  
**D-21.310** Whether clarification of point of diversion, not intelligible from the public notice, requires republication depends on whether difference in descriptions is material. Published point of diversion and clarified point of diversion not very different. Held, that in this case republication not required as difference not material. [FO]

**E-22.980** Point of diversion not stated on relevant Senate Bill #76 claim cannot be recognized as existing point of diversion, and hence cannot be changed.

**J-21.800** It is beyond the scope of Department proceedings to establish a division of existing water rights on the source. [FO]

**J-21.800**  
**L-1.940** Section 85-2-402, MCA, applies to existing water rights acquired prior to the effective date of the Water Use Act.

**J-21.800**  
**T-5.800**  
**R-5.930** Only those portions of stipulation relating to fulfillment of statutory criteria may be included in permit conditions. [FO]  
In its exception applicant clarified point of diversion. Held, the Department will accept this clarification at the post proposal stage. [FO]

<b>Final Order Date:</b>	01/09/85 (G W/C)	<b>Applicant:</b>	City of Bozeman/ Lichtenberg
<b>Case #/Type:</b>	20736-s41H (P) 20737-s41H (S) (Lichtenberg)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	10/23/78	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	1984	<b>Use:</b>	Municipal

**A-4.930** Occasional freezing of the source not adverse effect attributable to applicant. [Memo.]

**A-4.9348.00** Enlargements of historic use are significant precisely because they change the stream conditions to the detriment of junior appropriators. [Memo.]

**A-4.9348.00** The ultimate test for the protection of junior rights to maintenance of stream conditions is whether the burden on the stream will be changed under the changed senior use. [Memo.]

**A-4.9348.00** Change application must show that it has title to water right so as to preclude simultaneous use of water right by alleged vendor. [Memo.]

**A-43.9348.48** Although change involves transfer of water to another basin, because only consumptive portion moved, no adverse effect to users in original basin. [Memo.]

**A-4.9348.48** Lichtenberg diversion resulted in return flow to Hyalite Creek; however, city's diversion will be 100% consumptive as to Hyalite users, while yielding return flow downstream on the East Gallatin. This would adversely affect Hyalite users. [Memo.]

**A-4.9348.48**  
**E-24.48** Enlargements of appropriations are reflected by increasing demands attendant to changes in the historic practice of exercising the adjudicated right. (Parameters of right set forth in decree are predicated on use during dry year, and do not define limit of right in terms of volume.) However, historic use may not be expanded under guise of change. [Memo.]

**A-4.9373** Effect of change of right from agricultural to domestic right must not involve alteration of pattern of use within period of use. Thus Bozeman must be limited to those times when the Lichtenberg right has been exercised historically, to wit: May 25 - June 10; June 25 - July 10; August 1 - August 10. [Memo.]

**A-4.9373**  
**T-5.800** Since pattern of use differs from municipality, it is necessary to condition the new municipal use in such a fashion that it parallels the historic pattern of need for agriculture. Here, must look to average water years and characteristic agricultural land management scheme. [Memo.]

**A-16.7516**  
**A-16.7567** Disposition of application for permit will reflect only that quantity of water the evidence shows is currently needed. [Examiner notes that this conclusion is at odds with **In re Plentywood**, 32722/33831.]

**B-5.6979**  
**J-21.800** Record does not contain reliable probative and substantial evidence to support a finding of the amount of future need. Thus, no water could be granted for future use, even if Department has jurisdiction to grant. [Memo.]

**B-21.780** Preponderance of evidence test is a higher burden than substantial credible evidence test. [?]

**B-21.780** [Discussion of Burden of proof/burden of production in change proceeding. **See** Addendum to Memo.]

**B-21.780**  
**E-14.9376**  
**E-22.480** Not necessary to decide whether Montana Environmental Protection Act supplements the "exclusive" criteria of § 85-2-311, MCA, as Department of Fish, Wildlife and Parks' allegations of adverse effect to environment are naked hearsay and immaterial.

**B-21.780**  
**E-24.4831** Objectors have burden to produce evidence as to existence and extent of their claimed existing rights, and as to the type and character of injury complained of.

**E-22.480**  
**E-24.4831** Blaney-Criddle method adequate to calculate agricultural consumptivity. Historic consumption is 301 acre-feet per annum. City limited to that. [Memo.]

**E-22.480**  
**E-24.4831** Notices of appropriation here given no force and effect, as they do not supplant the need of proof of beneficial use over a reasonable period of time.

**E-22.480**  
**S-21.6621** Findings and conclusions made herein reach issues connected with Bozeman's future uses, as these uses were argued at the hearing, and because such findings and conclusions may have evidentiary significance before the board. It is possible that parties may be collaterally estopped from rearguing same before board during reservation process.

**E-24.480**  
**J-21.800** This proceeding is not an adjudication. **In re Brown, In re Monforton.**

**E-24.480**  
**O-2.490** Objections of Montana Power Company and Bureau of Reclamation Reclamation stricken on basis that objections state no cognizable claim. **In re Brown, In re Anderson Ranch.**

**E-24.4831** It is proper, and not an adjudication of the right, to inquire into the existence of the right, and the extent of its historic use.  
[Memo.]

**E-24.4879**  
**S-20.720** Merely because a reservoir has the capacity to store water does not mean that water can be stored to that capacity to the detriment of others. Rather, the talisman of the right and the limit of storage, is the quantity of water reasonably required to fulfill the historic use.

**E-24.4879**  
**U-14.1259**  
**W-1.870** If applicant makes a **prima facie** showing of objectors' waste, and the amount of that waste is pivotal to the issue of unappropriated water, a permit should issue subject to the express condition precedent that the prospective appropriator enjoin such waste in a court of competent jurisdiction.

**E-24.4879**  
**W-1.870** City of Bozeman has made a **prima facie** showing that Hyalite Reservoir utilizes an unreasonable means of diversion, and hence wastes water. However, the issue of waste at Hyalite is not here pivotal as there is water otherwise available for Bozeman's application.

**J-21.800** This Department has no authority to order the owner of an existing right to do anything (unless applying for a change).

**J-21.800**  
**R-5.850** Application for permit for municipal future use denied for lack of subject matter jurisdiction. Application for permit contemplating future uses of water, not presently known, not properly before examiner. The legislature has expressly provided for the future needs of municipalities with the water reservation statute.  
[Discussion.]

**S-20.110** Ditch companies and other carrier entities do have standing to object on behalf of the interests of all water uses attendant to the respective projects.

**U-14.1259** City seeks water in winter when only uses are stock water. Unappropriated water available. [Memo.]

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<b>Final Order Date:</b>	01/15/85 (G)	<b>Applicant:</b>	Bartos
<b>Case #/Type:</b>	34551-c76H (C)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>		<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	1984	<b>Use:</b>	Irrigation

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**A-4.9348.20** Applicant wishes to move point of diversion upstream. Held, because of possible increased carriage losses in the new conveyance system, change in point of diversion could harm objectors who have right to receive their decreed amount at historic point of diversion.

[Authorization issued with conditions protecting objectors.]

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<b>Final Order Date:</b>	01/21/85 (G W/C)	<b>Applicant:</b>	Ben Lund Farms
<b>Case #/Type:</b>	51282-s41Q (P) G139972-41Q (C) (D)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	05/20/83	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	06/06/84	<b>Use:</b>	Irrigation

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**A-4.930**  
**A-4.9394** The fact that the lake is recharged and that the recharge is "cleaner" than the lake water held sufficient to prove no adverse effect to stock rights.

**B-21.780** Change applicant must make a **prima facie** showing that he has an  
**E-24.4831** existing right. [See attached memo for discussion of this and following four holdings.]

**E-22.480** Although the filing of an SB #76 claim is **prima facie** proof of its  
**E-24.4831** content, evidence adduced at the hearing held sufficient to overcome the claim.

**E-24.4831** Mere filing of a notice of intent to appropriate does not create a water right; it is only upon actual diversion from benefit that the right is created.

**E-24.4810** Nonuse for an extended period of time is strong evidence of intent to abandon.

**E-24.4831** Held, that there is insufficient evidence in the record to determine whether the right to be changed exists as stated on SB #76 claim.

**R-5.930** Receipt of additional evidence in an exception not proper. [FO]

**U-14.120** Evidence that 700 to 2,857 acre-feet per year enter Harwood Lake; that the lake is slowly getting bigger; that there are no perennial streams in or out of the lake; and that there are only stock water rights out on the lake held sufficient to prove existence of unappropriated water.

[Permit granted; change denied.]

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<b>Final Order Date:</b>	03/29/85 (G W/C)	<b>Applicant:</b>	Pitsch
<b>Case #/Type:</b>	26751-s40A (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	02/15/80	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	1984	<b>Use:</b>	Irrigation

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**A-4.9321** The permit process does not supplant the need for regulation of  
**U-14.120** rights according to their priorities, but merely blocks those uses for which there is never as a practical matter unappropriated water.

**A-4.9383** It is not adverse effect to downstream appropriators to reduce water  
**E-24.4831** behind dam, thereby reducing pressure, thereby reducing seepage, because downstreamers not entitled to dam seepage, only to natural flow. [FO]

**A-16.7567** Appropriations are measured at the headgate. Seepage and evaporation  
**D-21.310** losses are chargeable to the appropriation. However, provision to  
**W-1.870** divert more water than applied for to make up for such losses cannot be made in the present proceeding.

**S-20.720** Unappropriated water exists during periods of low flow only when  
**U-14.120** reservoir outflow equals or exceeds inflow.

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<b>Final Order Date:</b>	04/02/85 (D)	<b>Applicant:</b>	Donaghy
<b>Case #/Type:</b>	51709-s76D (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	01/17/83	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	None	<b>Use:</b>	Hydroelectricity

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**U-14.1274** Applicant failed to provide evidence that the amount of water requested was physically available at the point of diversion (even though given a second chance to get such information into the record). [Permit denied.]

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<b>Final Order Date:</b>	04/02/85 (G W/C)	<b>Applicant:</b>	Christley
<b>Case #/Type:</b>	G110476-76H (C)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	N/A	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	1984	<b>Use:</b>	Irrigation

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**A-4.930** Adverse effect determination must follow the precepts of the common law, which the legislature did not change by enactment of the Water Use Act.

**A-4.9348**  
**E-24.7630**  
**T-5.800** Where applicant seeks to move a portion of his right to irrigate a new place of use, but will continue to irrigate the entire old place of use with the remainder of the right and with contract water, a measuring condition must be placed on the change authorization to ensure that the total amount of water diverted under the right does not increase.

**E-22.480**  
**E-24.4831** Evidence given insufficient to rebut **prima facie** effect [evidence] of claim.

**E-24.7630** The appropriator may not "bootstrap" a new use onto an existing right through the guise of a change proceeding.

**W-1.870** Whether applicant's source is seepage or not, so long as it is tributary to objector's source, the rights must be administered on the same ladder of priorities.

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<b>Final Order Date:</b>	05/02/85 (G W/C)	<b>Applicant:</b>	Zinne Brothers
<b>Case #/Type:</b>	50642-s40A (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	05/17/85	<b>Examiner:</b>	Chronister/Elting
<b>Hearing Date:</b>	09/11/84	<b>Use:</b>	Irrigation

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**A-4.930**  
**R-5.930** Refusal to require bypass flow sustained. [FO]

**E-22.480**  
**S-21.6621**  
**U-14.120** Prior decisions of the Department relating to the existence of unappropriated water in the source are **prima facie** proof regarding existence thereof. No collateral estoppel however, as prior findings are subject to challenge. [FO]

**R-5.930** Finding of Fact #2 held clearly erroneous. [FO]

**U-14.1259** Imposes "Musselshell" conditions. [FO]  
 [Granted]

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<b>Final Order Date:</b>	05/14/85 (G W/C)	<b>Applicant:</b>	Zinne Brothers
<b>Case #/Type:</b>	22465-s40A (P) 27941-s40A & 27942-s40A	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	05/29/80	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	1984	<b>Use:</b>	Irrigation

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**U-14.120** Existence of unappropriated water in the Musselshell discussed.

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<b>Final Order Date:</b>	05/29/85 (G W/C)	<b>Applicant:</b>	Frost
<b>Case #/Type:</b>	52031-s76H	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	04/04/83	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	04/05/84	<b>Use:</b>	Recreation

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**A-4.9348.48** Even if no unappropriated water exists for a consumptive use, water may still be available for nonconsumptive use. [FO]

**A-4.9348.48**  
**R-5.930** Record shows use nonconsumptive because of substantial credible evidence that there would be little or no more evaporation from the proposed pond than already occurs due to high water table in area. Held, examiner's finding use nonconsumptive will not be overturned. [FO]

**E-22.480**  
**S-21.6621** Whether a permit issued to a different applicant contained particular conditions held irrelevant unless elements of **res judicata** can be shown.

**J-21.800**  
**S-21.660** "Appropriate" means to divert, impound, or withdraw a quantity of water. Held, offstream fish pond is an appropriation within meaning of Water Use Act, and therefore, is within Department jurisdiction.

**J-21.800**  
**S-21.660** Applicant has diverted water prior to issuance of permit. Held, criminal sanctions may apply, however, there is no statutory authority to deny a permit on such grounds. [FO]

**S-15.920** Whether the water course from which applicant would divert is a ditch or a natural water course held irrelevant. [Later contrary holding in **Zemliska**, 57870.]

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<b>Final Order Date:</b>	05/31/85 (D)	<b>Applicant:</b>	Bowman
<b>Case #/Type:</b>	54154-s43Q (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	02/22/84	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	09/19/84	<b>Use:</b>	Domestic

**B-15.690** An illegal use of water is not a beneficial use.

**U-14.1259** Only evidence of record re unappropriated water shows that claims on Blue Creek far exceed the flow. Held, applicant failed to prove unappropriated water in source.

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<b>Final Order Date:</b>	07/08/85 (G W/C)	<b>Applicant:</b>	Sullivan
<b>Case #/Type:</b>	27197-s40A (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	03/26/80	<b>Examiner:</b>	
<b>Hearing Date:</b>	03/17/82	<b>Use:</b>	Irrigation

**U-14.1259** Musselshell River water availability study indicates that there is unappropriated water in the drainage, although there is not always as much as applicant requests, and water is almost never available in July and August. However, applicant can make use of whatever water is available under the terms of permit to which he has agreed. [Case settled; permit issued.]

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<b>Final Order Date:</b>	07/15/85 (G W/C)	<b>Applicant:</b>	McAllister
<b>Case #/Type:</b>	31441-g41R (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	01/21/81	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	12/01/83	<b>Use:</b>	Irrigation

**E-22.4879**  
**M-5.110** Although utilizing artesian flow is an adequate means of diversion, it is not a protectable one. An appropriator may not prevent new appropriations where he can reasonably exercise his water right under the changed conditions. He cannot monopolize the source simply so he may have a convenient means of diversion.

**J-21.800** Court will use a balancing approach in assessing damages to prior

M-5.110            appropriator who must upgrade his means of diversion if they were reasonable.

[Permit granted.]

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<b>Final Order Date:</b>	07/15/85 (D)	<b>Applicant:</b>	Miller
<b>Case #/Type:</b>	V157350-76H (C)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	08/08/83	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	06/27/84	<b>Use:</b>	Irrigation

A-4.9373            Applicant must show the pattern of the historic use.

B-21.780            It is applicant's burden to delineate the scope of its existing right.

E-22.480            An SB #76 claim constitutes **prima facie** evidence of the existence,  
E-24.4831            scope, and extent of a water right; however, if objectors introduce  
contradictory evidence, applicant must introduce more evidence on  
the existence and scope of the right.

E-24.4831            A water right is defined by actual beneficial use, not amount  
claimed or even decreed.

E-24.4831            Although it lacks jurisdiction to adjudicate a water right, the  
Department must be able to ascertain with reasonable certainty the  
scope of an existing right in order that it may determine whether a  
change can be authorized.

J-21.800            Fact that parties have entered into private sales agreement  
L-1.940            in no way exempts party who is changing a water right from Water Use  
Act. (FO)

J-21.800            Department has no jurisdiction to deny permit based on  
P-18.720            injuries to property other than water rights.

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<b>Final Order Date:</b>	07/25/85 (G W/C)	<b>Applicant:</b>	Sackman, Inc.
<b>Case #/Type:</b>	54911-g42M (P)	<b>Regional Office:</b>	Miles City
<b>Application Date:</b>	01/26/84	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	10/12/84	<b>Use:</b>	Irrigation

I-14.900            Interim permit for testing will not automatically get provisional  
permit.

I-14.900            Applicant must pay for well monitoring system.

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<b>Final Order Date:</b>	09/18/85 (D)	<b>Applicant:</b>	Northhydro, Inc.
<b>Case #/Type:</b>	51722-s76D (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	01/25/83	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	None	<b>Use:</b>	Hydroelectricity

A-16.7516            **Bona fide** intent can be evidenced by applicant's submission of filed  
FERC applications or evidence otherwise showing it is pursuing the  
proposed appropriation with reasonable diligence. (IO)

B-15.890            Applicant submitted no evidence that it is pursuing the necessary  
J-21.800            local state and federal permits, etc., to do the project. Held,  
proper to issue interlocutory order (allowing applicant to retain  
priority date) requiring that applicant present evidence that the  
necessary FERC authorization has been made in order to receive  
favorable proposal. (IO)



**E-14.9376** Because of mitigative measures (including minimum instream flow), held that EIS not warranted. (IO)

**E-14.9376** It appears that information required by and prepared by USFS special use permit satisfies the MEPA EIS requirement. (IO)

[Applicant failed to comply with Interlocutory Order; application denied without prejudice.]

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<b>Final Order Date:</b>	09/19/85 (D)	<b>Applicant:</b>	Blakely
<b>Case #/Type:</b>	14295-g41F (P)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	07/27/77	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	02/13/85	<b>Use:</b>	Irrigation

**A-16.7567** Applicant amended application at hearing. Priority date changed to date of hearing.

**J-21.800**

**E-22.480** Unsupported statement that there is sufficient water in the pit is insufficient evidence of water availability on which to base a provisional permit.

**U-14.1274**

**M-5.110** Applicant's description of project so vague as to be unidentifiable.

**R-5.930** Rehearing expressly prohibited under ARM 36.12.231, except as required under specified statutes which do not apply. [FO]

**R-5.930** No portion of the "exceptions" filed by applicant specifically sets forth what part of decision is being excepted to. They are therefore accorded little attention. [FO]

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<b>Final Order Date:</b>	09/24/85 (P-G w/C) (C-D)	<b>Applicant:</b>	Bladholm
<b>Case #/Type:</b>	12123-s76M (P) 9782-c76M (C)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	10/08/76	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	1984	<b>Use:</b>	Irrigation

**A-43.9348.48** Although change involves transfer of water to another basin, because only consumptive portion moved, no adverse effect to users in original basin. [Memo.]

**A-4.9348.48** Lichtenberg diversion resulted in return flow to Hyalite Creek; however, city's diversion will be 100% consumptive as to Hyalite users, while yielding return flow downstream on the East Gallatin. This would adversely affect Hyalite users. [Memo.]

**A-4.9348.48** Enlargements of appropriations are reflected by increasing demands attendant to changes in the historic practice of exercising the adjudicated right. (Parameters of right set forth in decree are predicated on use during dry year, and do not define limit of right in terms of volume.) However, historic use may not be expanded under guise of change. [Memo.]

**E-24.480**

**A-4.9348.00** The result herein does not inevitably determine that a change authorization should have been a condition precedent to the applicant's switch from flood to sprinkler irrigation. Even assuming, however, that such authorization is not required, the effects of the alteration are relevant in devising conditions to alleviate injury where the change at issue is clearly within Department jurisdiction. [Memo]

**J-21.800**

**T-5.800**

**A-4.9373** Effect of change of right from agricultural to domestic right must not involve alteration of pattern of use within period of use. Thus Bozeman must be limited to those times when the Lichtenberg right has been exercised historically, to wit: May 25 - June 10; June 25 - July 10; August 1 - August 10. [Memo.]

**A-4.9373** It is not feasible based on the evidence herein to conjure any condition which would assure that the new 58.1 acre tract would be irrigated in the same fashion as the old 58.1 acre portion of the original tract. [Memo]

**A-4.9373**  
**E-24.4831** Applicant failed to prove the diversion rate of its existing right. Further, there is no evidence that all 174 acres were regularly and customarily irrigated. (Rather, it appears that water was rotated over the fields, and that not all acreage was irrigated every year.) Held, applicant's use on new 58.1 acre tract pursuant to changed right would [could] result in an enlargement of the appropriation by increasing the quantity historically diverted to irrigate the old 58.1 acre portion. [?]

**A-4.9373**  
**T-5.800** Since pattern of use differs from municipality, it is necessary to condition the new municipal use in such a fashion that it parallels the historic pattern of need for agriculture. Here, must look to average water years and characteristic agricultural land management scheme. [Memo.]

**A-16.750**  
**S-20.720** Applicant applied for 167 acre-feet per annum to be impounded in reservoirs of the same capacity. He may not fill and refill reservoir in the same season. [Memo]

**B-5.6979**  
**S-20.720** Applicant must charge to its appropriative limit any carryover storage as 167 acre-feet is maximum that can be beneficially used in a year. [Memo]

**B-21.780** Applicant has burden of proof by a preponderance.

**B-21.780** Preponderance of evidence test is a higher burden than substantial credible evidence test. [?]

**B-21.780** [Discussion of Burden of proof/burden of production in change proceeding. **See** Addendum to Memo.]

**B-21.780**  
**E-24.4831** Objectors have burden to produce evidence as to existence and extent of their claimed existing rights, and as to the type and character of injury complained of.

**E-22.480**  
**E-24.4831** Blaney-Criddle method adequate to calculate agricultural consumptivity. Historic consumption is 301 acre-feet per annum. City limited to that. [Memo.]

**E-22.480**  
**E-24.4831** Notices of appropriation here given no force and effect, as they do not supplant the need of proof of beneficial use over a reasonable period of time.

**E-22.480**  
**E-24.480**  
**S-21.6621** Purported determination of water right in court case not dispositive where decision voided for lack of subject matter jurisdiction. However, findings made in such case may not be void for all purposes. [Addendum B.]

**E-22.480** Findings and conclusions made herein reach issues connected with

S-21.6621 Bozeman's future uses, as these uses were argued at the hearing, and because such findings and conclusions may have evidentiary significance before the board. It is possible that parties may be collaterally estopped from rearguing same before board during reservation process.

E-24.480 This proceeding is not an adjudication. **In re Brown,**  
J-21.800 **In re Monforton.**

E-24.480 Mere fact that water may pass through a storage structure does not  
S-20.720 make them stored waters. A wide spot in a ditch is not a storage appropriation. Direct flow and storage rights are different creatures with different incidents, and are spawned by different appropriative intents. Thus, the claim of existing right must be analyzed as a direct flow use. [Memo]

E-24.4831 It is proper, and not an adjudication of the right, to inquire into the existence of the right, and the extent of its historic use. [Memo.]

E-24.4831 Notices of appropriation not in strict compliance with statute are not **prima facie** evidence of matters asserted therein. Further, water must be beneficially used to create right, but notices at best show intent to appropriate and not consummation thereof. Accordingly, to show existence of right, evidence re actual use is necessary in addition to notices. [Addendum B]

E-24.4831 Objections of Montana Power Company and Bureau of Reclamation  
O-2.490 stricken on basis that objections state no cognizable claim. **In re Brown, In re Anderson Ranch.**

S-20.720 The statutory thresholds of unappropriated water and adverse effect  
T-5.800 vis-a-vis the new appropriation yield no significant questions in so  
U-14.1259 far as applicant seeks an appropriation by way of storage. Although source is highly appropriated during irrigation season, it is not during off season. Period of diversion limited to September 15 - June 15. [Memo]

U-14.120 The permit scheme is not a replacement for the need of stream administration according to priority, but merely blocks use that would otherwise always have to be curtailed in light of existing demand on source. [Memo]

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Final Order Date:	10/24/85 (D)	Applicant:	Gannon
Case #/Type:	46560-s41K (P)	Regional Office:	Lewistown
Application Date:	03/12/82	Examiner:	Bond
Hearing Date:	05/23/85	Use:	Irrigation

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E-24.4894 Applicant could only guess at the amount of water available in the  
U-14.1259 source absent "return flows" from Sun River Project, which are not available for appropriation as the project has not relinquished control of them after the first use, but rather has the intent to reuse such flows by utilizing the source as a conduit for such flows which are then in fact reutilized by the project. Held, applicant failed to prove § 85-2-311(1)(a) met.

S-15.920 It does not matter whether the source is considered a water course or not. Post-1973 rules of water appropriation same regardless of source.

[Permit denied.]

<b>Final Order Date:</b>	10/29/85 (EXT G)	<b>Applicant:</b>	Yellowstone Village
<b>Case #/Type:</b>	31587-g41F (P) (SC)	<b>Regional Office:</b>	Bozeman
	33294-g41F (P) (SC)		
<b>Application Date:</b>	04/24/80	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	08/28/84	<b>Use:</b>	Domestic

  

**A-16.7516** While permittee's present intent allows it to attempt gradual  
**B-5.6979** development of water for 239 units, a line must be drawn between  
present intent and speculation. Permit is for 450 acre-feet;  
however, the maximum amount needed for 2,390 units is 358.5 acre-  
feet. Permit must be modified to allow diversion of only 358.5 acre-  
feet.

**A-16.7516** Department cannot allow permittee so much time to complete that the  
**P-5.8021** permit is effectively for future uses.

**A-16.7516** There are no guidelines as to what time period is reasonable.  
**P-5.8021** However, without deciding whether a completion deadline of 20 years  
**T-5.800** is too long because many of board reservations were granted for a  
period of about 20 years, it can still be said that 18 years is too  
long. Fourteen years seems appropriate. [?]

**B-21.780** Department in modification proceeding has burden of production to  
**P-5.8021** show that reasonable minds may differ regarding whether permittee  
has completed the appropriation. The burden of persuasion is on the  
permittee.

**D-21.310** Right to cross-examine is fundamental; applies under either formal  
**E-22.480** informal rules of evidence.

**D-21.310** In the usual case, the provisional permit volume would not be  
**J-21.800** amended as a result of the field investigation unless actual volume  
**P-5.8031** applied was less than that permitted. However, in this proceeding,  
an extension for completion of a still inchoate right is being  
considered. Thus, there is no reason not to correct the original  
error of granting too much volume.

**E-22.480** Formal rules of evidence do not apply unless all parties stipulate  
thereto. Department in modification proceeding did not so stipulate.  
Held, informal rules apply.

**E-22.480** Cost benefit analysis of permitted use is neither relevant nor  
material to this modification proceeding.

**E-22.480** Department's objection to evidence of permittee's intent subsequent  
**P-5.8021** to filing of notices of completion overruled. Because of the facts  
of the case, notices of completion cannot be given the legal effect  
of eliminating permittee's chance to continue incremental  
development of its appropriation up to the use applied for. Such  
evidence relates to intent of permittee vis-a-vis incremental  
development.

**F-5.250** Congress did not intend in bankruptcy statutes to deprive the state  
**J-21.800** jurisdiction over water rights. Held, that the Department has  
concurrent jurisdiction with regard to debtor's water rights by  
virtue of the governmental regulatory exception to the automatic  
stay of proceedings, and further that the Department also has  
concurrent jurisdiction over that portion of the water rights not  
the property of the debtor. [Lengthy discussion.]

**F-5.250** Because of lack of federal intent to preempt state water law and  
**J-21.800** because operation of state law does not frustrate the essential purpose of the Bankruptcy Act, Department actions in determining to what extent permits have been completed are not preempted.

**J-21.800** Bankruptcy court has exclusive jurisdiction over the water rights (permits) in issue once they have been defined by the Department, because the unknown equitable interest of the debtor subjects the entire water right to the category of "property of the estate".

**J-21.800** Jurisdictional issues of the Black Letter Law must be raised **sua sponte** by a court of limited jurisdiction, even if not argued by parties.

**J-21.800** Department has the discretion to remedy its own wrong.

**J-21.800** Filing of notices of completion did not divest the Department of  
**P-5.8031** jurisdiction to grant an extension of time to complete the appropriation.

**P-5.8021** The **Bailey v. Tintinger** rule of gradual development where appropriator relies on third parties to complete actual use has been incorporated in the statute allowing the Department to set time limits for completion.

**P-5.8021** Although **Bailey v. Tintinger** seemed to allow vesting of a water right upon mere compliance with the statute rather than upon actual use, the Water Use Act incorporating the **Bailey** rule added the statutory requirement for actual use of water prior to vesting.

**P-5.8021** Department erred in limiting time for completion of all water use  
**T-5.800** for 239 domestic units to 9 or 13 months. Obviously, more time is reasonably needed.

**P-5.8031** To obtain extension of time, permittee must have been prosecuting the appropriation with due diligence.

**P-5.8031** Diligence does not require an unusual or extraordinary effort, but it does require the steady application of effort. This must be determined on a case-by-case basis.

**[At Final Order, the Department adopted only those Conclusions of Law in the proposal relating to Department jurisdiction over water rights involved in a bankruptcy. The following summaries reflect conclusions substituted.]**

**D-21.310** Department gave permittee more time than was requested. However, as  
**T-5.800** such short period was nevertheless a limit, due process required that the applicant receive with the permits a statement of opinion regarding the time limits, and notice that they could be appealed. The Department failed to do this, a technical procedural error. To correct this error, the agency will reissue the permits with a completion date of 1995, and issue the necessary statement of opinion with notice of right to request hearing. If no request is received, the permits as issued will constitute the final agency order. [FO]

**J-21.800** Because of technical procedural error, there was no final agency decision and therefore revocation/modification of permit premature. Therefore, conclusions relevant to revocation/modification are rejected. [FO]

**P-5.8031** The Department expressly rejects any finding [**sic**] to the effect that intent and due diligence considerations outside of time limits established by a permit can be considered by the Department unless made during the application process or pursuant to a timely request for extension. [FO]

**R-5.930** Permittee could have contested the short completion dates in  
**S-21.6621** exceptions to the original proposal to grant the permits. It did  
**T-5.800** not. Further, it could have appealed the final order to district court. It did not. However, because a technical procedural error occurred in the issuance of the permit, in this instance, the permit did not constitute an appealable final agency order, and the failures to appeal do not estop revision of dates. [FO]

[Permit reissued with 1995 completion date.]

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<b>Final Order Date:</b>	11/14/85 (D)	<b>Applicant:</b>	Dan
<b>Case #/Type:</b>	42667-s41I (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	11/03/81	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	05/10/85	<b>Use:</b>	Irrigation/stock/ domestic

**A-16.7516** Not only must an applicant have *bona fide* intent, he must proceed to  
**P-5.8021** develop the project with due diligence. Here, Applicant testified he could not proceed with diligence, indeed, he may not have the requisite intent since he stated he might not develop the project even if he could.

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<b>Final Order Date:</b>	01/08/86 (G W/C)	<b>Applicant:</b>	Ward
<b>Case #/Type:</b>	49643-s41C (P)	<b>Regional Office:</b>	Bozeman
	49644-s41C (P)		
<b>Application Date:</b>	12/17/82	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	None	<b>Use:</b>	Hydropower

**A-4.9312** Applicant failed to prove by clear and convincing evidence that the  
**L-1.790** proposed large appropriation of water would not adversely affect  
**T-5.800** objector as objector's point of diversion may be between intake and return, and thus the use may be consumptive as to her. However, imposition of condition subjecting nonconsumptive permit to stream commissioners will ensure her senior priority is enforced despite general characterization of the use as nonconsumptive. Large appropriation criteria held met with the condition.

**E-14.9376** No environmental impact statement was prepared; however, because the Department has clearly taken a good, hard look at the issues, publicly noticed the application, and retains supervisory control over the provisional permits, the dictates of MEPA are met.

**P-5.8021** FERC denial of authorization shall result in revocation of the permit.

**S-21.660** Burden of showing the existence of a factual dispute normally falls on party opposing summary judgment and that burden cannot be discharged by reliance on pleadings or speculative allegations. However, Department will not grant motion without great scrutiny of the record, whether or not opponent responds.

[Granted.]

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<b>Final Order Date:</b>	01/20/86 (G W/C)	<b>Applicant:</b>	Carter
<b>Case #/Type:</b>	49573-s43B (P)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	09/13/82	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	08/29/84	<b>Use:</b>	Hydropower
	03/07/85		

**A-4.930** More frequent appointment of a water commissioner is not an adverse effect.

**A-4.930** Where application does not fall into public interest review, no requirement that Department take possible adverse effect to aesthetic interests into account. [FO]

**A-4.9348.48** Legal requirement for a use to be nonconsumptive. **i.e.**, that there be little or no diminution in supply and that the water be returned to the source sufficiently quickly that little or no disruption will occur in stream conditions below the point of return, met.

**A-16.750** Whether venture is ultimately profitable not relevant to whether use beneficial. [FO]

**A-16.7516** Permit will issue despite fact that applicant has not yet obtained  
**M-5.110** FERC operating license as evidence shows applicant is presently diligently pursuing same.

**A-16.7567** Downward amendment of application at hearing permitted with proviso that the record would be left open for further evidence specific to amendments.

**E-14.9376** Pine Creek is navigable under State law because susceptible of public use and therefore public trust must be considered.

**E-14.9376** Public trust doctrine applies to State decisions regarding allocation of natural resources.

**E-14.9376** Assuming **arguendo** that public trust considerations are mandated in the case of small appropriations, it need not be decided here what those considerations are as they cannot be stretched so far as to require more than the type of mitigation already provided for by applicant.

**E-14.9376** Examiner did not conclude that enabling statute omitting trust considerations for smaller appropriations precludes application of the public trust doctrine. [FO]

**E-14.9376** Examiner did not conclude that private riparian ownership precluded application of the public trust doctrine. [FO]

**E-24.4831** Testimonial evidence presented at the hearing may rebut the **prima facie** effect of SB #76 claims.

**I-14.870** If FERC license requires minimum bypass flow, such flow will be protectable in addition to the 12 cfs hereby appropriated despite fact that it is not included in permit. [See Final Order for more detailed explanation.]

**R-5.930** Record reopened for new testimony after initial hearing over because facilitates complete understanding of case and no prejudice to applicant.

**S-20.120** There is no requirement that the objector's case be detailed in the proposal for decision. [FO]

**S-21.660** Objector's motion to dismiss after presentation of applicant's case overruled because dismissal would contravene the intent of the Administrative Procedure Act, and because parties (applicant) would not have opportunity to cross-examine Department employee, who authored document contained in the Department file already part of the record.

**U-14.1259.70** Even if source often will not generate the requested flow, upappropriated water criterion fulfilled if applicant for nonconsumptive use can make use of lesser flows than the flows requested. [FO]

**U-14.1274**

[Granted.]

<b>Final Order Date:</b>	01/21/86 (G W/C)	<b>Applicant:</b>	Campbell
<b>Case #/Type:</b>	28306-s41I (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	07/23/80	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	04/26/85	<b>Use:</b>	Mining

**A-4.9325** Where return flow significantly delayed, the use must be considered consumptive.

**U-14.1259.70**

**A-16.7516** Priority date of filing an application cannot include amounts requested which are premised on the hope or belief of increased production at some future point.

**A-16.7516** Applicant argued that requiring an immediate effective date was an unconstitutional deprivation of property without due process as he had filed the application before passage of the act requiring date specification. However, the statute allowing the Department to cease action if no date specified, merely expresses prior substantive law regarding speculative appropriations. In other words, only procedure was changed, not substantive law, and it is entirely proper to apply the new statute retroactively.

**D-21.310**

**D-21.310**

**J-21.800**

**D-21.310** Objection to evidence based on no notification prior to hearing.

**E-22.480** Held, because applicant's demand for production was contingent on objection to Department Exhibits 1 and 2, and objector did not object to those exhibits, no duty to produce exhibit prior to hearing. Second, Department computer printouts are authenticated documents, and are thus admissible under any standard.

**E-22.480** Objection to testimony based on allegation that, because documents had been admitted no further testimony thereon is proper, overruled. Admission of evidence initiates questioning, it does not end it. Document is admitted if it complies with certain rules designed to guarantee a minimal level of veracity; then, there is open season on same. Without admission, topic is barred.

**E-22.480** Findings of fact in prior decisions are admissible as rebuttable evidence even as against persons not parties or in privity with parties hereto.

**E-22.480** Applicant did not quantify flow in Confederate Creek, and findings in prior Department decisions regarding the creek show the stream is overappropriated. Held, applicant did not prove existence of unappropriated water for consumptive use.

**U-14.1259**



**E-24.4820** The Department must use discretion in certifying issues of existing rights to the Water Court, as if it does not, all cases before the Department would be certified, bringing the permitting process to a screeching halt.

**E-24.4820** Certification may be well advised in a change proceeding because were an applicant's right recognized by the Department as larger than it really is, and allowed to be changed, irreparable harm could be done to other appropriators (especially juniors). However, in applications for a new use, as here, such dangers to other appropriators do not exist.

**E-24.4831** Where testimony contradicts filings (notices of appropriation of Senate Bill #76), the filings may be successfully rebutted.

**S-21.660** Long delay in bringing case to hearing is not due to lack of diligence on part of applicant. Held, dismissal will not lie.

**T-5.800** If permit conditioned so that use is nonconsumptive, **i.e.**, so that  
**U-14.1259.70** there is no delay in return flow, then it may be found that unappropriated water exists in the source (so long as water physically available at point of diversion).

**U-14.1259.70** Where water to percolate through ground on its return, and time delay not known, must presume significant delay.

**U-14.1259.70** **De minimus** accidental spill of water onto ground would not render the use consumptive. [FO]

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<b>Final Order Date:</b>	01/21/86 (G W/C)	<b>Applicant:</b>	Mikesell
<b>Case #/Type:</b>	31382-g41J (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	01/27/81	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	04/02/85	<b>Use:</b>	Irrigation

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**A-4.9321** The increased expense of hiring a water commissioner is not adverse effect to senior appropriators.

**A-4.9394** Objector who has been receiving cleaner water than was historically received is not adversely affected even if applicant's appropriation would reduce quality of objector's water back to original.

**B-5.690** Poor water quality in Hot Springs Creek is unsuitable for irrigation. Held, appropriation from this source cannot be permitted because cannot be beneficially used for stated purpose.

**S-15.920** Subsurface water which is ultimately tributary to surface water courses is not "groundwater" within the meaning of Water Use Act.  
**U-14.1259.25** Applicant has brought subsurface water to the surface. However, there is insufficient evidence that such water would not have eventually risen to the surface anyway. Therefore, such water cannot be deemed developed water and is subject to call by prior appropriators on Hot Springs Creek.

[Permit granted.]

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<b>Final Order Date:</b>	03/03/86 (D)	<b>Applicant:</b>	Luckcuck
<b>Case #/Type:</b>	4409-s41I (P) 4410-s42I (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	12/09/74	<b>Examiner:</b>	Spaeth
<b>Hearing Date:</b>	11/13/75	<b>Use:</b>	Stock

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U-14.120 No unappropriated waters in source. [Permit denied.]

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<b>Final Order Date:</b>	03/03/86 (G W/C)	<b>Applicant:</b>	Ridgeway
<b>Case #/Type:</b>	53498-s41S (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	11/14/83	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	09/12/85	<b>Use:</b>	Irrigation

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A-4.930 The possibility that applicant will not comply with a call on the source is not adverse effect.

A-4.9321 Objectors will be adversely affected if they have to call the source every time they need water; therefore, the permit must be conditioned to require that applicant bypass sufficient flow.

B-5.6979 Water right cannot be greater than the amount needed to serve the  
S-21.760 use. Application is for supplemental water. Held, permit to be issued in conjunction with other rights for a combined appropriation not to exceed the irrigation requirements of the place of use.

I-14.870 Applicant uses existing groundwater right for same purposes as water  
S-21.760 here applied for (irrigation of the same place of use). Held, applicant may utilize well water to supplement creek flow to meet bypass condition.

M-5.110 Means of diversion not presently adequate to divert full requested amount. Held, permit may issue for the amount requested subject to modification upon verification.

[Exceptions filed; above holdings sustained.]

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<b>Final Order Date:</b>	03/07/86 (D)	<b>Applicant:</b>	Grayson
<b>Case #/Type:</b>	55390-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	05/14/84	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	10/25/85	<b>Use:</b>	Irrigation

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A-24.4810 Although a water right may have been lost by failure to claim within time limit specified by water court, conclusive presumption of abandonment does not apply to corresponding ditch right.

E-24.4879 Applicant asserted there would be sufficient water in Blodgett Creek  
U-14.1259 if the seniors' means of delivery were not so inefficient. However, applicant did not prove that the ditches were unreasonably inefficient, or that an increase in efficiency would satisfy exercised prior rights.

M-5.1129 Whether applicant presently has an easement to construct or use ditch not relevant to determination of whether proposed means of diversion are adequate.

U-14.1259 Senior user of Blodgett Creek testified that there is never a year when he gets his full appropriation. Held, no unappropriated water in source.

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<b>Final Order Date:</b>	03/17/86 (G W/C)	<b>Applicant:</b>	West Kootenai Water Users Association
<b>Case #/Type:</b>	39887-s76D (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	05/26/81	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	07/27/84	<b>Use:</b>	Irrigation/Power Generation

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**A-4.930** Downstream user possesses a permit which requires a 5 cfs bypass flow. Held, applicant must pass same in order that permittee not be adversely affected.

**E-22.480** General notions about how a hydropower facility would be  
**M-5.110** incorporated into system for appropriating irrigation water held insufficient to show appropriation works adequate.

**E-24.4831** Even though Water Court has not recognized validity of instream flow  
**I-14.870** claim in temporary preliminary decree, Department must recognize a claim as **prima facie** evidence of its content until issuance of final decree.

**J-21.800** No permit necessary for emergency fire use. Person entitled to make  
**L-1.940** initial diversion to pressurize hydrants in nonemergency; however, no other diversion allowed except in actual emergency.

**M-5.110** Irrigation appropriation works held adequate if applicant installs screens to prevent fish and fry from entering the system.

[Permit granted.]

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<b>Final Order Date:</b>	03/18/86 (G W/C)	<b>Applicant:</b>	Hochstetler
<b>Case #/Type:</b>	52793-s76D (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	07/06/83	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	07/27/84	<b>Use:</b>	Irrigation

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**A-4.930** Permittees below applicant's proposed point of diversion have a  
**I-14.870** permit which imposes a 5 cfs instream flow requirement. Held, applicant must allow 5 cfs to bypass his point of diversion to prevent adverse effect to permittees.

**E-14.930** [Final Order addresses concerns re whether environmental protection concerns were reason for imposing instream flow requirements rather than specific 85-2-311 criteria.]

**E-24.4831** Instream flow requirements based on filed claims which state flows  
**I-14.870** rather than on federal reserved rights which do not; held flowby requirements not based on unquantified right. [FO]

**I-14.870** Applicant has volunteered to comply with FWP claimed instream flows;  
**T-5.800** therefore, permit conditioned so that he must forgo diverting when source flow falls below 25 cfs.

**M-5.110** Proposed means of diversion adequate if measuring devices installed  
**T-5.800** at or below point of diversion to ensure required minimum instream flow.

**U-14.120** Although full requested flow may not be available throughout period of use because applicant can make full use of what water there is, 85-2-311(1) (a) held fulfilled.

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<b>Final Order Date:</b>	03/31/86 (Remand)	<b>Applicant:</b>	MacMillan
<b>Final Order Date:</b>	07/19/84 (Orig.) (G W/C)	<b>Regional Office:</b>	Bozeman
<b>Case #/Type:</b>	42666-g41F (P)	<b>Examiner:</b>	Elting
<b>Application Date:</b>	03/17/82	<b>Use:</b>	Hydropower
<b>Hearing Date:</b>	04/27/83		

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**A-4.9390** The thermal content of water is a protectable element of the appropriator's water right to the extent necessary to allow him to reasonably exercise those rights.

**A-4.9390** Objectors have had to mix cold water with the geothermal water in order to use it for the hot pool; accordingly, a small drop in thermal content of the water due to applicant's appropriation will not adversely affect them. They can still reasonably exercise their right.

**A-4.9390** Withdrawals of geothermal water greater than the sustained yield of the geothermal aquifer will work adverse effect to other water rights by thermal loss.

**A-4.9395** Even if applicant's appropriation should reduce artesian pressure, the well would not be drawn down to a point where it could not be readily pumped. No adverse effect.

**A-4.9395** Objector's certificates are junior to this application. They are thus subject to any permit issued herein and therefore cannot be adversely affected.

**A-4.9395** Objector has several wells and springs, any of which can supply the various uses. Therefore, even if one or two of the wells are significantly impacted, the uses can still be served. No adverse effect.

**A-16.7516**  
**B-5.6910** Recreation is a beneficial use of water whether commercial or private. [FO]

**B-21.780**  
**E-24.4831** Objector's burden of production re his existing right is discharged when the evidence and all proper inferences therefrom viewed in a light most favorable to the objector are sufficient to allow a reasonable mind to conclude that an existing right exists. [FO]

**E-22.480** Official notice may be taken of facts not presented in testimony as long as the parties are made aware of the facts noticed and have an opportunity to contest them. Reference to officially noticed facts may first be made in the proposal, and may contest them by filing exceptions. [FO]

**E-24.4810** Assuming the Department has jurisdiction to make such a determination, the evidence in this record is not sufficient to support a finding that applicant's rights are abandoned. [FO]

**E-24.4831**  
**U-14.1259** However applicant has presented a much more compelling case that one objector's rights, the pool right, is exercised only periodically, **i.e.**, is normally utilized only when filling the pool (three days out of twelve). Accordingly, there is that much more flow which is statutorily unappropriated, and which applicant may appropriate (subject to call, of course). [FO]

**E-24.4831**  
**U-14.1259** Applicant failed to prove that objector's water rights do not exist; consequently, his attempt to show that the corresponding amount of water is unappropriated water failed. [FO]

**R-5.930** Reiteration of Findings of Fact in a proposed Conclusion of Law does not render the conclusion improper. [FO]

**[Final Order appealed to District Court; case remanded for receipt of more evidence. Revised Proposal for Decision (RP4D) issued.]**

**A-4.9395**  
**E-24.4879**  
**J-21.800** The Department can require that an applicant pay certain cost to ensure that a prior appropriator will not be adversely affected, and has done so in the past. However, that past requirement was based on a specific finding that the senior's means of diversion was reasonable, the opposite of the instant case. It is premature to make the determination now; however, it is possible that costs may be imposed on applicant if objectors are unable to obtain their senior water rights by a reasonable means of diversion. [RFO]

**D-21.310** No harm or undue surprise where testimony of expert based on data already in the possession of the party. (RP4D)

**E-22.480** Objection that testimony of expert should be disallowed because "his position [interest] in the matter is unclear" overruled. (RP4D)

**E-22.480** Although testimony of expert was based on data collected by someone not present at the hearing, **i.e.**, was based on hearsay, his testimony is admissible under ARM 36.12.221. (RP4D)

**E-22.480** Hydrology is not an exact science. The Department therefore cannot deal in certainties, but must rely on the best available information. [RFO]

**E-22.480**  
**E-24.4831** The Department is empowered to make preliminary administrative determinations as to the existence and extent of claimed water rights, with the proviso that such determinations are only to further the Department's duties and are not **res judicata**, but are subject to decisions in the adjudication process. (RP4D)

**E-24.4810**  
**U-14.1259** Although nonuse of water right may or may not lead to finding of abandonment, it is evident that water is available for applicant's use. [RFO]

**E-24.4831** Spring flows only 20 gpm; claim was for 40 gpm. Held, only 20 gpm protectable. (RP4D)

**E-24.4831** The springs which supply objector's pool right cannot be turned off. Therefore, the spring flow must be allowed for on a continuous basis rather than on a periodic basis as was done in the initial Final Order. (Spring flow also used for sewage lagoon.) [RP4D]

**E-24.4831** [Revised Final Order (RFO) contains long discussion of why Department must make preliminary administrative determinations of the extent of the objector's water rights.]

**E-24.4879** Artesian flow is not a protectable means of diversion. [RP4D]

**E-24.4879** A court could conceivably require applicant to share the expense of installing a new means of diversion, depending on the reasonableness of the objector's means of diversion, extent of the adverse effect, the economic reach of the parties, and the maximization of beneficial use of the water. [RP4D]

**E-24.4879** An appropriator must make a reasonable and economical use of water even though changing to a reasonable diversion method might occasion "some additional expense" to the appropriator. [RFO]

**U-14.1259** Unappropriated water determination based on normal actual use by senior appropriator. If senior later must make use of his right to the full extent of his claim, he can call the source. [RFO]

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<b>Final Order Date:</b>	05/27/86 (G W/C)	<b>Applicant:</b>	Tangen Ranch
<b>Case #/Type:</b>	54628-g410 (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	11/10/83	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	11/06/85	<b>Use:</b>	Irrigation

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**A-16.750** Applicant desires and can make use of any water which is available.  
**U-14.120** Therefore, the application is to be understood as seeking amounts of water up to and including the requested amount.

**E-24.4831** Although objector Guthrie constructed the ditch which diverts water from the aquifer, he did so in 1983 and no permit was obtained for the use of the water. Therefore, neither he nor the Eldorado Canal Company are entitled to use water diverted by the Guthrie Ditch.

**E-24.4894** Even if Eldorado Canal Company does have a right to divert runoff from Guthrie irrigation (with shares of Eldorado water) and return same to its ditch for reuse, it does not have a right to use the straight ditch constructed by Guthrie in 1983 (which replaced the old contour ditch), for it changed the place of diversion and no authorization was obtained.

**E-24.4894** Because Eldorado does not have the right to divert using the Guthrie  
**S-15.920** Ditch, water runoff from Eldorado share irrigation is waste water  
**U-14.1259** and is subject to appropriation as such  
**W-1.870**

**M-5-110** Neither does a permit grant an easement.

**M-5.1129** Means of diversion are adequate if feasible. Statute does not require a showing of present easement over the land of another.

**S-15.920** Because Ralston Gap aquifer is hydrologically related to surface water, it is considered surface water under Water Use Act.

**S-15.920** Because the means of diversion was installed as a drain ditch, and  
**U-14.120** will continue to function as such, this appropriation will create no additional burden on the aquifer.

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<b>Final Order Date:</b>	06/25/86 (G W/C)	<b>Applicant:</b>	Graveley
<b>Case #/Type:</b>	47276-s41I (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	06/28/82	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	07/30/85	<b>Use:</b>	Irrigation

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**A-4.930** Possibility applicant will not abide by permit conditions or that  
**J-21.800** water commissioner is corrupt held not a sufficient basis on which the Department will deny a permit.

**A-4.9325** Downstream seniors are adversely affected if they cannot reasonably exercise their senior rights by calling permittee because of substantial delay in arrival of released water.

**T-5.800** Applicant did not present evidence that he could make do with less  
**U-14.120** than the full requested amount; accordingly, the requested period of use must be curtailed to such period as the full amount more likely than not will be available.

**U-14.200** Although Confederate Creek is overappropriated on paper (SB #76 filings), testimony that there is unappropriated water in June and July coupled with evidence of flows sufficient to supply applicant

at the outlet of the source during this period show that there is sufficient unappropriated water.

[Permit granted.]

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<b>Final Order Date:</b>	07/07/86 (G W/C)	<b>Applicant:</b>	Kenney
<b>Case #/Type:</b>	55362-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	04/27/84	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	11/22/85	<b>Use:</b>	Irrigation

**A-4.930** It is possible that applicant could adversely affect objector ditch owners by placing his infiltration gallery too close to the ditch thereby inducing seepage therefrom. Held, Department will test for induction during first season, and applicant must modify system if there is induction.

**A-4.9383**

**A-16.750** If Applicant can make use of such amounts of water as are available for his use, § 85-2-311(1)(a)(ii) and (iii), MCA, are met. The amount requested is viewed as an upper limit on the appropriation.

**U-14.120**

**U-14.1259** Appropriators only possess the corpus of water diverted so long as it remains in their control; once it seeps out of the ditch it was lost to their control and is appropriable by another as waste.

**W-1.870**

**W-1.870** However, even if a permit is granted for the appropriation of waste water, the generators of such waste cannot be compelled to continue generating it.

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<b>Final Order Date:</b>	08/08/86 REVOKED	<b>Applicant:</b>	McDonald
<b>Case #/Type:</b>	31883-g76L (R)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	01/16/81	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	06/19/86	<b>Use:</b>	Irrigation

**B-21.780** Department met burden of going forward in matter of revocation of by putting on evidence that work on the permitted appropriation had not begun, etc.

**P-5.8021**

**B-21.780** Permittees failed to meet their burden of persuasion both as to whether there is good cause to grant an extension of time to complete and as to whether there is good cause not to revoke as they failed to appear at the hearing and as the Department file alone will not support a finding of good cause.

**P-5.8021**

**P-5.8031**

[Permit revoked.]

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<b>Final Order Date:</b>	08/26/86 (D)	<b>Applicant:</b>	Brookside Estates
<b>Case #/Type:</b>	56738-s76M (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	07/19/84	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	12/16/85	<b>Use:</b>	Recreation

**A-4.9348.48** For a use to be nonconsumptive there must be (1) little or no diminution of the source, and (2) water diverted must be returned to the stream sufficiently quickly that little or no stream disruption occurs in stream conditions.

**A-4.9348.48** Initial fill of reservoir is a consumptive use.

**A-4.9348.48** Where use is truly nonconsumptive, unappropriated water exists in the source if water is physically present at the point of diversion.

**A-4.9348.48**  
**A-4.9394** Where applicant could dispose of used water either by returning it to the source, or by diverting it into a ditch from which other source users divert, absent plans showing how no more water would be shunted down ditch than the users thereon required, there is a substantial possibility that the proposed use would be consumptive and wasteful.

**A-4.9394**  
**B-21.780** The evidence indicating possible diminished quality of return flow, one objector alleging downstream domestic use, applicant has the burden to prove that the domestic use will not be adversely affected by the proposed appropriation.

**B-5.6910**  
**B-5.6979** Assuming without deciding that aesthetic use is beneficial, applicant must nonetheless prove that the full amount requested can be used without waste for the stated purpose.

**J-21.800** Cannot make change in existing right at hearing on application for new permit.

**M-5.1129** Grant of a permit does not implicitly grant a ditch right.

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<b>Final Order Date:</b>	09/04/86 (G W/C)	<b>Applicant:</b>	Allred
<b>Case #/Type:</b>	41255-g41B (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	02/16/82	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	02/21/85	<b>Use:</b>	Irrigation

**A-4.930** Mere diminution of water supply is not necessarily adverse effect to objectors. [FO]

**A-4.9395** Evidence shows that appropriators of subsurface water will not have to deepen their wells. Held, no adverse effect to them.

**B-5.6979** To prevent waste, permit can issue only in conjunction with applicant's existing rights. [FO]

**B-21.780**  
**S-15.920**  
**U-14.1259.25** Subsurface water is presumed tributary to surface source, and applicant claiming to have developed water (by removing it from the ground and adding it to surface source) has burden to show that subsurface water was not in fact tributary. However, applicant here has not claimed the water was developed.

**E-24.480** Under certain circumstances, surface appropriators may be required to withdraw underground water tributary to a stream to satisfy their appropriations. [Obiter dictum.]

**E-24.4879**  
**J-21.800**  
**S-21.720** If actual stream administration deprives permittee of his water in priority, remedy is in District Court. If Clark Canyon Dam is operating with excess carryover storage (waste), Allred would have cause of action to enjoin.

**S-15.920** Subsurface water in this case held not ground water within meaning of Water Use Act, as evidence shows it is part of surface water. Such water is treated as if it were the surface source to which it is tributary.

**S-21.850** Subirrigation not a protectable means of diversion. None of the objectors have the right to maintenance of the status quo in the aquifer so that their crops will be subirrigated in the spring.



**U-14.120** To fulfill § 85-2-311(1)(a), MCA, all that need be shown is that there is sufficient water in at least some years for the proposed appropriation, and that the appropriation is in fact administrable.

**U-14.1259.00** Although sum of SB #76 claims seems to exceed capacity of source, testimony that all appropriators on source have sufficient water in normal years held sufficient to prove that unappropriated water exists in source under Water Use Act.

**U-14.1259.00** Objectors argue that prior to construction of Clark Canyon Dam, stream was overappropriated, and that any further withdrawals can thus only be made by purchase of shares from Clark Canyon Water Supply Co. However, now it is difficult to determine whether unappropriated water exists because the current regime of river is not governed by priorities but rather by a public water supply company. (Therefore, examiner's conclusion that there is unappropriated water sustained?) [FO]

**U-14.1259.25** Assuming that water is available to applicant because of Clark Canyon Dam, if company which developed that water cannot control it, it cannot deny applicant its use. [?] [FO]

[Permit granted.]

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<b>Final Order Date:</b>	09/10/86 (G W/C)	<b>Applicant:</b>	Grether
<b>Case #/Type:</b>	G34573-76H (C)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	07/08/81	<b>Examiner:</b>	Williams
<b>Hearing Date:</b>	08/20/82	<b>Use:</b>	Irrigation
<b>Oral Argument Date:</b>			07/16/85

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**A-4.9348.10** Appropriator's new system does not waste water which previously was unavoidably wasted due to reasonable inefficiency of old irrigation practices. Held, water salvaged by new system can be used for new beneficial purposes (extending place of use) by appropriator under priority date attendant to old use so long as there is no adverse effect to other appropriators. [Discussed at length in Proposal for Decision and Final Order.]

**A-16.7576** Because public notice misleading, it must be republished (and  
**D-21.310** receive no new objections) before proposed disposition becomes effective.

**J-21.800** Objection based on Objector claiming legal title to water rights  
**O-2.490** also claimed by applicant stricken as it does not require expertise of administrative agency for resolution.

**O-2.490** Parties which objected to application did not object to misleading  
**S-21.6621** public notice. Held, they are collaterally estopped from objecting, post-proposal.

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<b>Final Order Date:</b>	11/14/86 (D)	<b>Applicant:</b>	Frederick
<b>Case #/Type:</b>	58432-s43A (P)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	04/29/85	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	02/21/86	<b>Use:</b>	Irrigation

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**A-4.930** Where record shows that objector would have to call applicant every time objector wishes to divert water, there is adverse effect to the objector.

**B-21.780** Where applicant presents unsubstantiated testimony there is  
**E-22.480** unappropriated water in the source, and that testimony has been

U-14.120 contradicted by objector's equally unsubstantiated testimony, applicant has not met his burden of proof regarding the criterion.

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<b>Final Order Date:</b>	11/21/86 (G W/C)	<b>Applicant:</b>	Shesne
<b>Case #/Type:</b>	56173-s43D (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	08/13/84	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	10/28/85	<b>Use:</b>	Irrigation

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E-24.4879 Subirrigation is not an adequate means of diversion, nor is it a  
M-5.1188 protectable means of diversion.

W-1.870 Waste appropriator cannot compel continuance of ditch seepage.

W-1.870 Water which seeps out of ditch, flows down a coulee and subirrigates  
U-14.1259.25 trees is waste water lost to source and may be considered  
unappropriated.

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<b>Final Order Date:</b>	12/03/86 (G W/C)	<b>Applicant:</b>	Meyer
<b>Case #/Type:</b>	50510-s76L (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	03/11/82	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	03/21/86	<b>Use:</b>	Domestic/ Recreation

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A-4.9321 The possibility that applicant or his successors will not cooperate  
with senior users held no adverse effect.

B-5.690 No evidence that requested year round lawn and garden use would be  
beneficial in winter months. Use restricted to growing season.

B-5.6939 Because applicant failed to present evidence demonstrating that the  
B-5.6979 amount of water requested was reasonably necessary for the support  
of several hundred fish, fish pond use denied. However, pond may be  
used for storage for other uses applied for.

E-24.4848 Permit should contain condition subjecting it to Indian rights. [FO]

U-14.120 Testimony of objectors that they do not believe that applicant's use  
would deprive them of water, together with evidence of physical  
availability of water at the proposed point of diversion held  
sufficient to prove unappropriated water exists.

[Permit granted]

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<b>Final Order Date:</b>	12/31/86 MODIFIED	<b>Applicant:</b>	Erwin
<b>Case #/Type:</b>	21673-s41H (R)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	01/26/79	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	08/19/85	<b>Use:</b>	Irrigation
<b>Oral Argument Date:</b>	12/03/85		

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B-21.780 The permittee has the burden of persuasion that it is more likely  
than not that insufficient grounds exist for modification of the  
permit.

B-21.780 In revocation, Department has burden to produce evidence that shows  
P-5.8021 a question exists as to whether the permit was perfected as issued.

D-21.310 Department is not bound by initial recommendation of field office  
E-22.480 that water right be reduced to .25 acre-feet based on field office  
J-21.800 estimate of water actually applied when evidence at hearing shows  
this estimate too large.

P-5.8021 Only one acre out of two actually irrigated for only two hours during one season. Permit must be modified to reflect this reduced actual use.

P-5.8021 During the two hours of irrigation, permittee exceeded the flow rate allowed in the permit. Held, the permit cannot be perfected outside the permit terms; therefore, the volume of water diverted as the result of exceeding the permit flow rate is not part of the perfected right.

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Final Order Date:	02/13/87 (D)	Applicant:	Crumpled Horn
Case #/Type:	G40605-410 (C)	Regional Office:	Havre
Application Date:	03/10/82	Examiner:	Elting
Hearing Date:	06/12/85	Use:	Irrigation
Oral Argument Date:	01/07/87		

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E-24.4810 Claim filed for irrigation water appropriated by means of dam and reservoir is **prima facie** evidence of existence of water right. However, other record evidence tends to show that dam washed out 85 years ago, and that right has not been used since 1908. Held, **prima facie** effect of claim overcome, and absent proof by applicant that right exists as claimed, change authorization cannot issue.  
[Authorization denied.]

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Final Order Date:	03/03/87 (D)	Applicant:	Cutler
Case #/Type:	56782-s76H (P)	Regional Office:	Missoula
	56830-s76H		
Application Date:	08/15/84	Examiner:	Scott
Hearing Date:	04/25/86	Use:	Irrigation

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A-4.930 Where there is unappropriated volume in a source but no unappropriated flow, applicant can only divert when the senior is not diverting. In such case, if the applicant is upstream, and it appears that the senior will have to call upon applicant every time he requires water, the senior is adversely affected.

A-4.9394 Department of Health and Environmental Sciences' issuance of discharge permit is not conclusive proof that water quality of the source will not be diminished. [Final Order]

B-21.780 Objector need not prove that an adverse effect will occur. [FO]

B-21.780 It is not necessary for objectors to raise issue of reasonable  
J-21.800 amount; it is the Department's independent duty to ascertain. [FO]

E-22.480 All claims filed by objector for irrigation of the same place of use  
E-24.480 may be considered in determining the extent to which a given claim  
U-14.1259 of existing water right is actually used.

E-24.4820 Department declined to certify claim of existing right.

E-24.4831 Claim stands as **prima facie** proof of its content. Applicant attempted to overcome the claim by providing estimates of objector's requirements to show that claim was overstated, but failed because such estimates were based on optimum efficiencies not required of objector by law.

**U-14.1259.25** The developer of a supply of water theretofore not part of the source (surface or subsurface) available to other appropriators has the first right to take and use such increase.

**U-14.1259.25** Where applicant has brought water to surface by means of infiltration gallery, but has not proved that such water would not have risen below to the benefit of other appropriators, he has not proved that such water is developed water.

**U-14.1259.25** Merely piping water around a 15-year old blockage in a natural stream is not development of water.

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<b>Final Order Date:</b>	03/04/87 (D)	<b>Applicant:</b>	Crisafulli
<b>Case #/Type:</b>	50272-g42M (P)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	10/05/82	<b>Examiner:</b>	Bond
<b>Hearing Date:</b>	03/29/84	<b>Use:</b>	Irrigation

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**A-16.7567** Held, no prejudice to objectors due to 11th hour amendment to application reducing acreage to be irrigated. [IO]

**D-21.310**

**B-5.690** The Department tests an application for economic benefit only to the extent that lack of economic benefit is indicative of waste. [IO]

**W-1.870**

**E-22.480** Certain hearsay not allowed; right of cross-examination must be protected. [IO]

**E-22.480** Testimony of lay witness given great weight where witness has long standing familiarity with the area at issue. [IO]

**I-14.900** Applicant entitled to interim permit because actual diversion the only way to find out whether pumping well will deplete surface water source to detriment of objectors. [Interlocutory Order attached memo]

**I-14.900** Issuance of an interim permit does not entitle applicant to a provisional permit. [IO]

**S-20.120** "Groundwater" here not groundwater within meaning of statute because hydrologically connected to surface water. [IO]

[Applicant's failure to do testing for which interim permit granted resulted in summary proposal to deny. Denied.]

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<b>Final Order Date:</b>	03/16/87 REVOKED	<b>Applicant:</b>	Staton
<b>Case #/Type:</b>	20074-s76G (R)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	08/28/78	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	01/07/87	<b>Use:</b>	Irrigation

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**B-21.780** In revocation proceeding, Department has burden of producing evidence tending to show that a question exists as to whether the permit was perfected within its terms.

**P-5.8021** Water collecting in reservoir has never been used for the purposes permitted, irrigation and fish, as reservoir will not hold water long enough to allow for such uses. Mere construction of a reservoir is not completion of the appropriation. Water must be put to beneficial use.

[Permit revoked.]

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<b>Final Order Date:</b>	03/23/87 (G W/C)	<b>Applicant:</b>	Eagle Creek Colony
<b>Case #/Type:</b>	G113493-41N (C)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	05/31/85	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	04/30/86	<b>Use:</b>	Reservoir

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**A-4.930** Where applicant presents evidence that, except in very high water periods, water entering source above a reservoir never makes it past the reservoir, and objectors present no evidence refuting same, and applicant's proposed change concerns only that water in the source above the reservoir, there can be no adverse effect to objectors below the reservoir regardless of the effects of the change, except during high water.

**A-4.930** Where objectors rely on high water to fill their reservoirs, applicant cannot change his diversion so that water which was not previously captured during high water would now be captured. Authorization must be conditioned to preserve high water status quo.

**A-4.930** Objector's claims also stand as proof of their content; however mere recitation of the claim is not sufficient to fulfill objector's burden of production as to adverse effect. The record must also contain some evidence of a causal connection between the proposed change and the alleged adverse effect.

**B-21.780** Where applicant has presented claims which objectors allege are invalid or erroneous, but objectors provide no evidence to support such allegation, the claims stand as proof of their content, and are sufficient to make the necessary threshold showing of the existence of the water rights to be changed.

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<b>Final Order Date:</b>	04/06/87 (G W/C)	<b>Applicant:</b>	Pitsch
<b>Case #/Type:</b>	53547-s40A (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	02/02/84	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	11/22/85	<b>Use:</b>	Irrigation
<b>Oral Argument Date:</b>	03/18/87		

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**U-14.1259** Recorded claims indicate stream overappropriated; however, evidence also indicates that not all of the rights are used, and all parties agreed that there is in fact unappropriated water in the source during spring runoff. Held, that there is unappropriated water in the source during spring runoff.

[Musselshell conditions imposed.] [Oral argument held; above holding sustained.]

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<b>Final Order Date:</b>	04/23/87 (G W/C)	<b>Applicant:</b>	Lloyd
<b>Case #/Type:</b>	55834-s76LJ (P)	<b>Regional Office:</b>	Kalispell
	56386-s76LJ (P)		
<b>Application Date:</b>	05/04/84	<b>Examiner:</b>	Scott
	07/02/84		
<b>Hearing Date:</b>	06/09/86	<b>Use:</b>	Domestic/Irrigation

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**A-4.930** Objector's burden of production as to potential adverse effect is not limited to describing the kind and character of an alleged adverse effect; he must also produce evidence that would if viewed in the light most favorable to him provide a reasonable basis to conclude that there is a substantial potential that such adverse effect would occur. Mere allegation that applicant's pipeline might blow out (as some other appropriator's apparently had at one time) and wreck objector's water delivery system held insufficient to meet that burden.

**B-21.7835**

**B-15.690** If applicant has a fixed and definite plan which is not made contingent upon future circumstance, but is subject to defeat only by unanticipated contingency, he is definitely committed to the plan and his intent is **bona fide**. [Discussion.]

**B-15.690** Applicant stated that he has no present plans to build homes and cannot therefore estimate a date of completion of domestic water appropriation, and that he may sell some of the property and would like permit to increase property value. Held, his intent is speculative, not **bona fide**.

**U-14.1259** Although Station Creek is overclaimed, actual use data show that the full claimed amount is not utilized. Held, that at least in some years there will be sufficient unappropriated water available to supply 330 gpm requested.

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<b>Final Order Date:</b>	05/15/87 (G W/C)	<b>Applicant:</b>	Estate of Ryen
<b>Case #/Type:</b>	G120401-41H (C)	<b>Regional Office:</b>	Bozeman
	G120403-41H (C)		
<b>Application Date:</b>	06/01/1866	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	05/31/84	<b>Use:</b>	Irrigation

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**A-4.9373** Applicant must make threshold showing of historic use pattern so that Department may determine whether the use is not being enlarged to the detriment of other appropriators under the guise of a change.

**B-21.780** If applicant fails to show historic use pattern, Department cannot  
**E-24.4831** grant change without more information.

**B-21.780** Objectors must show reasonableness of their means of diversion.  
**M-5.110**

**E-24.4820** Because both applicant and objectors failed to provide sufficient information regarding their existing rights for the Department to make a determination re adverse effect, certain questions regarding the existing rights in this matter were certified to the Water Court.

**E-24.4831** Applicant for a change must make threshold showing of the existence and extent of the underlying right.

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<b>Final Order Date:</b>	05/27/87 (G W/C)	<b>Applicant:</b>	City East Helena
<b>Case #/Type:</b>	62231-g41I (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	05/19/86	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	01/28/87	<b>Use:</b>	Municipal

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**A-4.9395** Where evidence shows a maximum one foot of drawdown in the wells of  
**B-21.780** objectors, but objectors provide no evidence to suggest that they could not reasonably exercise their water rights under these conditions, and it does not appear that the proposed appropriation will result in long-term depletion of the aquifer, applicant has proven there will be no adverse effect to other appropriators.

**D-21.310** Where the parties themselves are the only witnesses called, their  
**E-22.480** testimony will not be suppressed for failure to formally answer discovery request for names of witnesses as it is reasonable to assume that the parties will appear and testify.

**D-21.310** Where parties failed to provide a summary of their testimony

**E-22.480** pursuant to discovery request, but no issues are raised which the discoverer could not have reasonably surmised from the contents of the documents on file, the testimony in question will not be suppressed.

**J-21.800** Time limits stated in §§ 85-2-309 and 85-2-310, MCA, are directory  
**P-18.710** rather than jurisdictional, and failure to act within those limits does not trigger a either mandatory approval or denial of the application. [Case citations.]

**S-21.660** Because other criteria besides adverse effect to objectors must be proved by applicant, summary judgement for applicant is not an appropriate sanction where objectors failed to respond to applicant's discovery requests.

**T-5.800** Where applicant has agreed to conditions to be imposed on any permit granted, and certain objectors have withdrawn their objections based on that agreement, such conditions will be placed on any permit issued, regardless of whether the application goes to hearing providing that those conditions are relevant to fulfillment of issuance criteria.

**U-14.120** If the applicant for percolating groundwater is physically able to access that water, and it is shown that his appropriation thereof will not adversely affect other appropriators, the logical conclusion is that the requested water is available and is not needed to meet the appropriation needs of other users, **i.e.**, that it is unappropriated.

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<b>Final Order Date:</b>	05/28/87 (G W/C)	<b>Applicant:</b>	Thoft
<b>Case #/Type:</b>	G128519-76H (C)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	04/18/85	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	04/28/86	<b>Use:</b>	Irrigation

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**A-4.930** Prior court approval is not a necessary prerequisite to proof of § 85-2-402(2), MCA.

**A-4.9348** Where several water rights are appurtenant to the same parcel, and  
**S-21.760** applicant wishes to move the place of use of one of them, and all  
**T-5.800** rights have historically been necessary to fully irrigate the parcel, the change authorization must restrict the use of the rights remaining appurtenant to the original parcel, so that greater than historic volumes are not diverted pursuant to those rights after removal of the changed right.

**E-22.480** The Department will reopen the record in a case if the evidence to  
**R-5.930** be taken is either evidence which a party could not, with reasonable diligence, have discovered and produced at the hearing, or evidence which for other justifiable reason was not produced at the hearing and which the Department finds essential to a determination of the case. Here, specifically, the record was reopened for the justifiable reason that applicant believed in good faith that the Department would not review and condition the use of other water rights, not specifically captioned in the change authorization, in order to ameliorate adverse effect. (Final Order.)

**E-24.4831** Claim constitutes **prima facie** proof of its content; thus, if no contradictory evidence is presented, the right is presumed to be as claimed.

J-21.800           Existence of a provision in a decree which forbids transfer of water right without prior court approval does not deprive the Department of jurisdiction over change.

W-1.870           Runoff which does not return to the source is waste and is not protectable. [Caution: This is an incomplete and somewhat erroneous statement of the law. In some circumstances an appropriator of waste is protected.]

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<b>Final Order Date:</b>	06/18/87 REVOKED	<b>Applicant:</b>	Haugen
<b>Case #/Type:</b>	P2049-g40R (R)	<b>Regional Office:</b>	Glasgow
	P2050-g40R; P2051-g40R;		
	P3480-g40R thru P3490-g40R;		
	P3529-g40R		
<b>Application Date:</b>	04/23/74	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	04/09/87	<b>Use:</b>	Irrigation

B-21.780           Department met its burden by producing evidence that permittees had not filed notices of completion, and had not commenced work on the project.

P-5.8021           Permittee defaulted by not appearing and otherwise failed to meet her burden to persuade that the permits had been perfected.

[Permits revoked.]

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<b>Final Order Date:</b>	06/22/87 (D)	<b>Applicant:</b>	Anson
<b>Case #/Type:</b>	27665-s41I (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	06/17/80	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	06/18/85	<b>Use:</b>	Irrigation
<b>Reconvened:</b>	08/21/85		
<b>Oral Argument Date:</b>	01/18/86		

M-5.1129           Whether objector has acquired the needed easements is not necessary  
O-23.6994           since the existence of a ditch right does not determine the validity of a claimed use right. Water rights are wholly distinct and severable from ditch rights.

U-14.1259.00       Allegations that objector does not have a valid water right at its  
U-14.1274           upper diversion does not constitute evidence of legal or physical  
B-21.21            availability. Applicant carries the burden of proof on the  
E-22.480           existence of unappropriated water and adverse effect. Here,  
                    applicant attacked objector's means of diversion as unreasonable,  
                    but produced no flow measurements or any other information to show  
                    the availability of water.

M-5.110            It is possible objector's diversion systems are very inefficient;  
O-23.6994           however, any determination of the reasonableness of objector's means  
J-21.800           of diversion must be made in the ongoing adjudication or another  
                    forum.

J-21.800           As part of its statutory duties, the Department may review  
W-1.870           reasonableness of objector's means of diversion to determine if  
                    waste is occurring. [FO]

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<b>Final Order Date:</b>	07/20/87 (D)	<b>Applicant:</b>	Cochran
<b>Case #/Type:</b>	53892-s76H	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	09/01/83	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	09/27/85	<b>Use:</b>	Irrigation



**B-15.690** Although soils are poor, many areas in Montana that have poor soils are irrigated, and it is not up to the Department to determine whether the benefits to the appropriator are "sufficient", as long as he is not wasting water.

**U-14.1259** Applicant failed to address the issue of unappropriated water. The mere fact that a ditch rider has been hired in only six out of the last twenty years does not mean there is sufficient unappropriated water in Kootenai Creek.

[Permit denied.]

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<b>Final Order Date:</b>	07/30/87 (G W/C)	<b>Applicant:</b>	Blair
<b>Case #/Type:</b>	G33710-41S (C)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	09/07/83	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	09/26/85	<b>Use:</b>	Irrigation

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**A-4.930** Original diversion off Smith Creek, a tributary of Wolf Creek. Application to move point of diversion downstream onto Wolf Creek. Held, under change, applicant can only divert that portion of Wolf Creek flow which represents water contributed thereto by Smith Creek. Diversion of more would increase burden on source and adversely affect objectors.

**A-4.9321** If a proposed change would substantially increase the number of calls a downstream appropriator must make, the change will adversely affect that appropriator. (**Dictum**)

**A-4.9348.00** Change applicant has the initial burden to show the proposed change  
**B-21.780** will not increase the burden on the source.

**A-16.7567** Amendment to application proposed first time at hearing disallowed.  
**D-21.310** Held, to allow would deny due process to interested parties who might have objected.

**B-21.780** In change proceeding, objectors must produce evidence as to the  
**E-24.4831** existence, scope, and character of their water rights, and the basis of anticipated injury to these rights.

**E-22.480** Change proceeding is not the proper forum to challenge the original  
**J-21.800** grant of the permit applicant wishes to change. Evidence pertaining thereto irrelevant to issues in change proceeding.

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<b>Final Order Date:</b>	08/07/87 (G W/C)	<b>Applicant:</b>	Estate of Ryen
<b>Case #/Type:</b>	49632-s41H (P)	<b>Regional Office:</b>	Bozeman
	G120401-41H (C)		
	G120403-41H (C)		
<b>Application Date:</b>	12/02/82	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	05/31/84	<b>Use:</b>	Hydroelectricity

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**A-4.9348.00** No adverse effect to objector because of delay in return flow where  
**A-4.9379** water is electronically released almost instantaneously and distance back to source is only a few thousand feet.

**A-4.9394** The element of water quality will be protected to the extent that water in the source will be satisfactory for downstream uses.

**A-4.9394** Objector must present more than a paucity of evidence that operation

**B-21.780** of the project will result in aeration or nitrogenation of the source to the extent that the water cannot be used for domestic purposes.

**A-16.7516**  
**B-5.690** Absent clear-cut evidence that a project is blatantly economically unfeasible, the Department will not find in the negative on the question of whether the use is beneficial.

**A-16.7516**  
**M-5.110** FERC approval not required in advance of obtaining permit to appropriate for hydropower.

**B-21.780** Burden to produce evidence of character of their rights and anticipated injury thereto on objectors. If this burden fulfilled, applicant has burden to prove no such injury will occur.

**B-21.780**  
**E-24.4831** In conjunction with the requirement that the underlying water right must be shown to exist before it can be changed, applicant must also show the extent and pattern of the past use of water, **i.e.**, its historic use, to ensure that the use is not being enlarged under the guise of a change.

**E-22.480** Testimony of a person who has several decades of experience with source is entitled to great weight.

**E-24.4820** Issues pertaining to the extent of applicant's water right certified to Water Court.

**E-24.4831** Applicant must make a threshold showing of the existence of the water right he seeks to change.

**E-24.4831**  
**J-21.800** Determining the existence and character of a water right for the purposes of implementing the change statute has nothing to do with adjudicating that right. [Discussion]

**I-14.870**  
**U-14.1259** Should FERC require greater instream flow protection than imposed herein pursuant to Department of Fish, Wildlife, and Parks' recommendation, permit will be reviewed for new determination of water availability. [FO]

**L-1.790**  
**L-1.940** Department not applying criteria of § 85-2-311, MCA, (1983) to applications filed before April 29, 1983, the effective date of the statute.

**U-14.1274** Even if full requested flows may not always be physically available, applicant can make use of whatever amount of water is available to increment his power generation.

[Granted.]

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<b>Final Order Date:</b>	08/11/87 (G W/C)	<b>Applicant:</b>	Klein, Jr.
<b>Case #/Type:</b>	G31306-s76G (C)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	01/12/81	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	08/06/86	<b>Use:</b>	Mining

**A-4.9348.20**  
**A-4.9394** The proposed changes cannot affect upstream objector, and will not result in increased degradation of water quality to downstream objector. Held, no adverse effect.

**E-24.4831** Because certain points of diversion and places of use are not